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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1884.

No. ~~889~~ 619

THE COUNTY OF SAN BERNARDINO, PLAINTIFF IN ERROR,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

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a *Transcript of Writ of Error.*

In the Circuit Court of the United States for the District of California.

THE COUNTY OF SAN BERNARDINO, Plaintiff,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY, a Corporation, Defendant. } No. 2757.

1 *Complaint.*

In the Superior Court of the County of San Bernardino, State of California.

THE COUNTY OF SAN BERNADINO, Plaintiff,
vs.
THE SOUTHERN PACIFIC RAILRAD COMPANY, a Corporation, Defendant.

Plaintiff complains and alleges—

1st. That the defendant is, and at all times hereinefter mentioned has been, a corporation duly organized and existing under the laws of the State of California, doing business therein and in the county of San Bernardino.

2d. That the defendant is indebted to the plaintiff in the
2 sum of eight thousand seven hundred and eighty-five $\frac{90}{100}$ ($8,785.90) dollars for taxes due the plaintiff for the fiscal year A. D. 1880 & 1881, with five per cent. added thereto, which said per cent. amounts to the sum of four hundred and thirty-nine $\frac{29}{100}$ ($439.29) dollars penalty for the non-payment thereof, and interest upon the whole amount of tax and penalty at the rate of two per cent. per month from the twenty-sixth day of December, A. D. 1880, until judgment, and fifty cents cost of advertising.

Plaintiff further avers that defendant is indebted to plaintiff in the further sum of four thousand six hundred and eight $\frac{99}{100}$ ($4,608.99) dollars for State taxes for the fiscal year A. D. 1880 & 1881, with five per cent. penalty added thereto for the non-payment thereof, amounting to the sum of two hundred and thirty $\frac{44}{100}$ ($230.44) dollars, and interest upon said tax and penalty at the rate of two per cent. per month from December 26th, A. D. 1880,
3 until judgment, and fifty cents costs of advertising, which said taxes were duly assessed and levied upon the real and personal property of said defendant, to wit, forty-eight $\frac{88}{100}$ miles of the roadway, road-bed, and rails of said defendant, assessed at ten thousand eight hundred dollars per mile. The rolling-stock of said defendant apportioned and assessed at nineteen hundred and thirty-three $\frac{15}{100}$ dollars per mile, and the franchise of said defendant assessed at two thousand dollars per mile, being in amounts, namely, for the franchise, total assessment, ninety-seven thousand seven hundred and sixty dollars; road-bed, rolling-stock, roadway, and rails, six hundred and twenty-two thousand three hundred and ninety-six $\frac{28}{100}$ dollars. That the whole of said defendant's property in the

State of California, so far as its franchise, roadway, rails, road-bed, and rolling-stock is concerned, was assessed for the fiscal year
4 A. D. 1880 & 1881, at ten millions four hundred and eighty-three thousand five hundred and eighteen dollars, and the whole number of miles in operation of its said road was in said fiscal year seven hundred and eleven $\frac{56}{100}$ miles. And that said taxes were so assessed upon defendants for the said fiscal year A. D. 1880 & 1881.

Wherefore plaintiff prays judgment against said defendant for said several sums, with penalty and interest as aforesaid and costs of suit.

C. W. C. ROWELL,
District Attorney and Attorney for Plaintiff.

Filed March 8th, 1882.

A. F. McKENNEY, *Clerk.*

I hereby certify the foregoing to be a full, true, and correct copy of the complaint on file in my office in the above-entitled action.

In witness whereof, I have hereunto set my hand and affixed
5 the seal of the above-named court, this 14th day of April, 1882.

[SEAL.] A. F. McKENNEY, *Clerk*,
By DAVID WOLF, *Deputy Clerk.*

6 *Summons.*

In the Superior Court of the County of San Bernardino, State of California.

THE COUNTY OF SAN BERNARDINO, Plaintiff,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY, a Corporation, Defendant.

Action brought in the superior court of the county of San Bernardino, State of California, and the complaint filed in the office of the clerk of said court in San Bernardino county.

The people of the State of California send greeting to The Southern Pacific Railroad Company, a corporation, defendant:

And you are hereby required to appear in an action brought by the above-named plaintiff against you in the superior court of the county of San Bernardino, in the State of California, and to answer the complaint filed therein within ten days, if the summons
7 is served within said county of San Bernardino; within thirty days if served elsewhere.

The said action is brought to receive of you the sum of eight thousand seven hundred and eighty-five $\frac{8}{100}$ dollars for taxes due the plaintiff for the fiscal year 1880 & 1881, with five per cent. added as a penalty for the non-payment of said taxes, amounting to the sum of four hundred and thirty-nine $\frac{27}{100}$ dollars, with interest at the rate of two per cent. per month upon said tax and penalty

from the 26th day of December, 1880, to judgment, and fifty cents costs advertising, and costs of suit. Also for the further sum of four thousand six hundred and eight $\frac{90}{100}$ dollars for State taxes for the fiscal year 1880 & 1881, with five per cent. added as a penalty for the non-payment of said taxes, amounting to the sum of two hundred and thirty $\frac{45}{100}$ dollars, with interest at the rate of two per cent. per month upon said tax and penalty from December 26th,
8 1880, to judgment, and fifty cents cost of advertising, and for costs of suit, reference being had to the complaint on file herein for further and full particulars.

And you are hereby notified that if you fail to appear and answer the said complaint, as above required, the said plaintiff will cause your default to be entered and take judgment against you for the sum of fourteen thousand and sixty-five $\frac{60}{100}$ dollars.

Given under my hand and seal of the superior court of the county of San Bernardino, in the State of California, this eleventh day of March, in the year of our Lord one thousand eight hundred and eighty-two.

[SEAL.] A. F. McKENNEY, *Clerk.*

Endorsed: Filed March 22, 1882. A. F. McKenney, clerk.

9 I hereby certify the foregoing to be a full, true, and correct copy of the summons, with sheriff's return endorsed thereon, on file in my office in the above-entitled action.

In witness whereof, I have hereunto set my hand and affixed the seal of the above-named court, this 14th day of April, 1882.

A. F. McKENNEY, *Clerk,*
By DAVID WOLF, *Deputy Clerk.*

OFFICE OF THE SHERIFF OF THE CITY AND COUNTY OF SAN FRANCISCO.

I hereby certify that I received the annexed summons on the 17th day of March, 1882, and personally served the same on the 17th day of March, A. D. 1882, upon The Southern Pacific Railroad Com-
10 pany, a corporation, the therein-named defendant, by delivering to J. L. Willcutt, secretary of said defendant, personally in the city and county of San Francisco, a copy of said summons attached to a certified copy of the complaint in said action therein named.

Dated at San Francisco, this 17th day of March, 1882.

JOHN SEDGWICK, *Sheriff,*
By H. LUNSTEDT, *Deputy Sheriff.*

11 *Answer.*

In the Superior Court of the County of San Bernardino, State of California.

THE COUNTY OF SAN BERNARDINO, Plaintiff,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY, a Corporation, Defendant. } No. 330.

Now comes the defendant, and answering the complaint of plaintiff on file herein—

I.

Denies each and every allegation in said complaint had, made, or contained, and denies that the defendant is a corporation organized or existing under the laws of the State of California, or organized and existing other than as hereinafter in this answer averred, and denies that defendant is indebted to the plaintiff in any sum whatever, or that there are any taxes due the plaintiff, with*out* or without percentage added, or that there is any penalty, costs, or interest due the plaintiff, or that any taxes were ever assessed or levied upon any property of *plaintiff* described in said complaint for the fiscal year mentioned in said complaint, or that any of the property mentioned in said complaint was ever assessed for said fiscal year for any sum or in any manner whatever, or that any taxes were assessed or levied against any of said property for said fiscal year. Denies that during said fiscal year, or at any other time, defendant had in operation $711\frac{56}{100}$ miles of road, or any greater number of miles than $706\frac{18}{100}$ miles. Defendant refers to and makes part of this subdivision the matters and things stated in subdivisions 2 to 37, inclusive, of this answer.

12 And for further and separate answer defendant avers:

II.

Defendant a corporation—Its place of business—Line of road—Stockholders.

That it is a corporation existing under the laws of the United States and of the State of California (as will hereafter more fully appear). That the principal place of business of defendant now is, and for many years last past has been in the city of San Francisco, State of California. That a great number of its stockholders now are, and ever have been, citizens of the United States and residents of said State of California, while other of its stockholders now are, and ever have been, citizens of the United States and residents of States other than the State of California.

13

III.

S. P. R. R.—The uses and purposes thereof.

That as such corporation it constructed a line of railroad, and procuring the rolling-stock and all appurtenances thereunto belonging, known and designated as the Southern Pacific railroad (of California), described as follows: Commencing on the waters of the Pacific Ocean, in the city and county of San Francisco, and extending in a southerly direction through portions of the county of San Francisco, and through the county of Santa Clara to Tres Pinos, in the county of San Benito, with a branch therefrom running from Carnadero, in the county of Santa Clara, to Soledad, in the county of Monterey; said line of railroad also extends from Huron, in Fresno county, to Goshen, in Tulare county, and thence in a southerly direction, by way of Tehachapi Pass, Mojave, and Los Angeles, to the Colorada river at Fort Yuma, with three branches from said line at Los Angeles, extending respectively to Santa Monica, Wilmington, and Santa Ana, in the county of Los Angeles. That said line of railroad is connected with the Texas & Pacific railroad at El Paso, in the State of Texas, by two railroads, to wit, the Southern Pacific railroad (of Arizona), extending from Fort Yuma to the eastern boundary-line of Arizona; and the Southern Pacific railroad (of New Mexico), extending from said eastern boundary line across New Mexico to El Paso. That said several railroads are operated as one continuous line from a point near Marshall, in Texas, to the Pacific Ocean at San Francisco, for the uses and purposes and in the manner contemplated by the acts of Congress hereinafter referred to.

That from Tres Pinos to Huron the said Southern Pacific railroad has not been completed, but, pending its construction, connection between said points is made over the lines of the Central Pacific railroad. That defendant has not completed the construction of the road from said Southern Pacific railroad to the Colorado river to connect with the Atlantic & Pacific railroad, hereinafter referred to, but has the construction thereof under contract, and will soon have completed a road from Mojave, on the line of said Southern Pacific railroad to the Colorado river, there to connect with said Atlantic & Pacific, and with the said Atlantic and Pacific, when completed, making a continuous line from Springfield, in the State of Missouri, to the Pacific Ocean, as contemplated by the act of Congress, hereinafter referred to, chartering the Atlantic and Pacific Railroad Company.

IV.

Length of the road in the several counties.

That of said Southern Pacific railroad (of California) there had been, prior to the first Monday in March, 1880, completed, and there was in operation in the several counties through which it runs, 706.18 miles, to wit: In the city and county of San Francisco, 7.3 miles; in the county of San Mateo, 21.10 miles; in the county of Santa Clara, 50.30 miles; in the county of Santa Cruz, 2.15 miles;

in the county of San Benito, 17.65 miles; in the county of Monterey, 49.28 miles; in the county of Fresno, 17.93 miles; in the county of Tulare, 61.98 miles; in the county of Kern, 117.83 miles; in the county of Los Angeles, 139.48 miles; in the county of San Bernardino, 54.60 miles, and in the county of San Diego, 158.85 miles, and all within the State of California.

V.

Act of Congress of July 27th, 1866. Atlantic and Pacific act.

That on the 27th day of July, 1866, the Government of the United States undertook to construct, or cause to be constructed, a line of railroad from a point at or near the town of Springfield, in the State of Missouri, to the head waters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude, as near as might be found suitable for a railroad route, to the Colorado river, at such point as might be selected, and thence by the most practicable and eligible route to the Pacific Ocean; and to that end Congress passed an act, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," which act was approved on the 27th day of July, 1866, and to said act defendant here refers by title and makes it part of this answer. (See United States Statutes at Large, vol. 14, page 292.) By said act certain persons therein named were made and erected into a corporation, under the name and style of the "Atlantic & Pacific Railroad Company."

VI.

Intent of Congress in passing act of 1866.

That the intent and purpose of Congress in passing said act was to secure the completion of a railroad from the Missouri river to the Pacific Ocean, with a branch to San Francisco, and to secure the use thereof for all time to come to the Governmeut of the United States for the transportation of its mails, troops, munitions of war and public stores.

14 VII.

Like privileges and immunites granted to defendant.

That to facilitate the construction of said road, the Government of the United States, by said act of Congress, adopted the defendant as the instrument or agent of the United States, and conferred upon defendant the same powers, and clothed defendant with the same privileges and immunities, which it conferred upon and clothed the Atlantic & Pacific Railroad Company with, except that the said defendant was to construct only that portion of said railroad between the Colorado river and the city and county of San Francisco.

VIII.

Acceptance of the conditions.

That the said Atlantic & Pacific Railroad Company did organize under said act, and did obtain *bona fide* subscriptions to the stock of said company to the amount of one million dollars, with ten per centum paid within two years after the passage and approval of said act of Congress; and the said company and plaintiff did immediately after the passage of said act accept the terms and conditions thereof, and have duly complied therewith.

IX.

Roads constructed under said act.

That the said company has nearly completed, and will, within a short time, have fully completed the whole of said road from Springfield to the Colorado river; and defendant has constructed said road as aforesaid to Mojave, with the exception hereinbefore set out, and is prosecuting the construction thereof from said Mojave to a junction with the road of the Atlantic & Pacific Company at the Colorado river; and the whole of said road will be completed and in operation within the present year.

X.

Act of Congress of March 3d, 1871.—Texas Pacific act.

That on the 3d day of March, 1871, the Government of the United States under to construct, or cause to be constructed, a line of railroad from Marshall, in the State of Texas, to San Diego, in the State of California, and from said line of road at the Colorado river to construct, or cause to be constructed, a line of railroad which would connect the road from Marshall to San Diego with the line of road provided for in the act of Congress of July 27th, 1866, hereinbefore referred to, and by means of said connecting road to connect the road from Marshall to San Diego with the city of San Francisco; and to that end Congress passed an act entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," approved March 3d, 1871, and subsequently, on the second day of May, 1872, passed an act entitled "An act supplementary to an act entitled an act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," approved March 3d, 1871. To said acts defendant here refers by title, and makes them part of this answer. (See vol. 16, U. S. Statutes at Large, 573; vol. 17, *Id.*, 59.)

XI.

Provisions of said acts accepted by the Texas Pacific Railroad Company and by defendant—their work thereunder.

That immediately after the passage of said act of March, 1871, the Texas Pacific Railroad Company was organized in pursuance

thereof, and it and defendant accepted all the terms and conditions of each of said acts of 1871 and 1872, and have fully and in every respect complied therewith, and under them and in compliance with the spirit and intent of said acts have completed the roads mentioned in the third subdivision of this complaint.

XII.

Intent of Congress in passing the acts of 1871 and 1872.

That the declared purpose of Congress in passing said acts was to insure the transportation of the mails, troops, munitions of war, supplies, and stores of the United States, and to that end Congress expressly declared in said acts that no act of said companies, or either of them, nor any law of any State or Territory, should ever impede, delay, or prevent the companies mentioned from performing their obligations to the United States in the regard.

15 XIII.

Indebtedness of defendant secured by mortgage.

That prior to the 1st day of January, 1881, the defendant was indebted to divers persons, citizens of the United States, and many of them then and now citizens and residents of the State of California, in large sums of money advanced to construct and equip the railroad hereinbefore described. That to secure the payment of such indebtedness the company long prior to the said first day of January, 1881, executed and delivered a mortgage upon said Southern Pacific Railroad, and all rolling stock and appurtenances; that said indedtedness exceeded and still exceeds three thousand dollars per mile of said road; that no part thereof has ever been paid, except the accruing interest, and that the whole thereof is now and since the execution of said mortgage has been a valid and subsisting indebtedness against said company, and has been and still is secured by said mortgage.

XIV.

Assessment by State Board of Equalization.

That on the 2d day of May, 1880, the State Board of Equalization of the State of California, pretending to act under and by virtue of the powers conferred upon it by section 10 of article XIII of the constitution of the State of California, did make a pretended assessment for the purposes of taxation for the fiscal year of said State then next ensuing upon the franchise, roadway, road-bed, rails, and rolling stock of said railroad against defendant. Said pretended assessment was made separately upon the franchise, roadway, road-bed, rails, and rolling stock of said railroad, and was then and there so entered upon the minutes of said board. And that said assessment is the assessment upon which the several taxes mentioned in the complaint herein are based; and that no other assessment than the aforesaid was ever made of said property, or any part thereof, for said fiscal year.

XV.

Failure of State board to transmit assessment.

The State Board of Equalization never did at any time transmit said pretended assessment or any assessment of said property, or any part thereof, to the assessor, or to any of the authorities of said county, and never at any time caused the same to be entered upon the assessment roll of said county for said fiscal year, or for any other year, nor has said pretended assessment, or any part thereof, or any assessment against said defendant or said property, or any part thereof, ever been entered upon or made part of any assessment roll, book, or delinquent list, in or for said county.

XVI.

State board never apportioned assessment.

Defendant avers, upon its information and belief, that neither said pretended assessment nor any assessment against defendant in respect to said property, or any part thereof, was ever entered upon any assessment roll or book of said county of ——, nor upon any delinquent list of said county, nor was any entry relative to the action of the said State Board of Equalization in respect to the assessment or apportionment of said property, or any part thereof, ever entered upon said assessment roll or book, except a letter from the State Board of Equalization, addressed to the assessor of said county, and that said letter did not contain said assessment or any part thereof, nor a copy of said assessment or any part thereof, nor did it contain any apportionment thereof, as provided for in section 10 of article XIII of the constitution of the State of California, hereinbefore referred to or otherwise.

XVII.

No assessment was ever made or entered on the assessment roll.

Defendant, upon information and belief, avers that neither said pretended assessment, nor any assesment against this defendant, or any other person or persons, in respect to the said property, or any part thereof, was ever entered upon any assessment roll or book of said county of San Bernardino, nor upon any delinquent list of said county; nor was any entry relative to the action of the said State Board of Equalization in respect to the assessment or apportionment of said property of defendant, or any part thereof, ever entered upon said assessment roll or book, except the said letter of the said State Board of Equalization. That said letter was copied by the assessor of San Bernardino county on or about the 1st day of June, 1880, upon the assessment. That upon said assessment roll opposite said letter is entered in figures $720,396.28, and opposite said figures, under the head of taxes due, is entered in figures $13,393.89. That the same entries, and no others, appear upon the delinquent list of said county for said fiscal year. That as defendant is informed and believes,

and upon such information and belief, charges the truth and fact to be there are in respect to the said property, and in respect to defendant, no other or further entries upon any assessment roll, book, or delinquent ilst of said county.

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XVIII.

State board pretended to assess the whole of said property to defendant.

That the State Board of Equalization in making the said pretended assessment pretended to assess to and against defendant the whole of said railroad, roadway, road-bed, rails, rolling stock and franchises, and failed to deduct therefrom the value of the mortgage given and existing as aforesaid thereupon to secure the indebtedness of said company to the holders of said bonds.

XIX.

State board did not treat said mortgage as an interest in the property.

That in making said pretended assessment the said State Board of Equalization did not deem or treat said mortgage as an interest in said property, but did assess the whole of said property to the defendant in the same manner it would have done had there been no mortgage thereon.

XX.

Pretended assessment and apportionment made before any other assessments in the State.

That the time the said pretended assessment was made and said pretended apportionment was made by the State Board of Equalization no assessment book or roll for the said fiscal year had been completed or was in existence, nor had a single assessment or valuation for the purposes of taxation for said fiscal year been ascertained or fixed as provided by law or otherwise, and that said board, in making said valuation and apportionment, neither did nor could exercise any of the powers relative to the equalization of values for the purposes of taxation.

XXI.

Authority exercised by State board violates provisions of Fourteenth Amendment.

That under the constitution of the State of California the board of supervisors of the several counties of the State constitute Boards of Equalization for their respective counties, whose duty it is to equalize the valuation of the taxable property in the county, except the franchise, roadway, road-bed, rails, and rolling stock of railroads operated in more than one county of the State; and that to

such boards the owners of all property, except as above stated, have the right and privilege to apply for the correction of the assessed values of such property, and have the right and privilege of a hearing before the said local boards of equalization. That by the provisions of the constitution of California, and the laws thereof, this right and privilege, or any right or privilege, to be heard in relation to the said assessment, is denied in respect to the property in question. All of which defendant avers is contrary to the provisions of the Fourteenth Amendment of the Constitution of the United States.

XXII.

Further violation of Fourteenth Amendment.

That the said State Board of Equalization never at any time made or had any rule or regulation relative to the assessment or valuation of railway property of any kind, nor never made or had any rule to govern or regulate its proceedings for the exercise of the powers conferred upon it by section 10 of article XIII of the constitution of California.

17 XXIII.

Further discrimination.

That the power conferred upon the State Board of Equalization by section ten of article XIII of the constitution violates the provisions of said Fourteenth Amendment, for that said section, as to such powers, is self executing and complete, and does not provide for personal or other notice to be given to the parties to be affected by the exercise of such powers, and does not provide for a full or any opportunity of time, place, or tribunal for such parties to be heard in defense of their rights; and that from, under, and by said provisions of the constitution of the State of California the liability of owners of such property to taxation, and the amount thereof, may be fixed without notice or an opportunity to be heard.

XXIV.

Further discrimination.

That the provisions of the constitution of the State of California providing for the assessment of railroad property operated in more than one county is in contravention of the provisions of said Fourteenth Amendment of the Constitution of the United States, in this, that it discriminates against the owners of railroad property operated in more than one county; in this, that whereas, under section four of said article XIII of the constitution of the State of California, if the owner of other kinds of real property have a mortgage, lien, or incumbrance thereon, he is not liable to assessment or taxation upon such property, nor for the value of his interest in such real estate over and above the value of such mortgage, lien, or incumbrance; whereas in case of railroad property no such allowance or deduc-

tion is made, had, or allowed with respect to any mortgage, lien, or incumbrance there may be upon such property.

XXV.

Further discrimination.

That all owners of railroad property, operated in more than one county, by virtue of the provisions of said section ten, of article XIII, which relate to the assessment by the State Board of Equalization of such property, are denied any protection from the law of the State of California, which—

(*a.*) Require that property shall be taxed in proportion to its value.

(*b.*) Require such proportions to be ascertained by a general law.

(*c.*) Require that before liability be fixed an opportunity to be heard must be given.

(*d.*) Give an appeal from the assessor to boards of equalization.

(*e.*) Require the assessment to be made in the county, and prevent its being made in localities distant from the *situs* of the property.

(*f.*) Which prescribe mode and manner of the assessment.

(*g.*) Which allow deductions for indebtedness secured by mortgage.

And defendant avers that at and before and ever since the adoption of the constitution of California, now in force, there were and are existing under the laws of said State corporations of various kinds formed for the purpose of and actually operating and doing business, and holding and using and operating property in more than one county in said State, and that at all of said times there were and there now are divers natural persons, residents of said State, operating property in more than one county in said State, and that at all of said times there were and now are railroads owned by corporations formed under the general laws of said State which are only operated in one county. That by the provisions of section ten of article XIII of said State constitution persons operating railroads in more than one county in the State have been singled out from all other persons operating property in more than one county and denied the right, common to all other persons, to appeal for relief from over valuations of their property by assessors to the local board of equalization and denied the rights and privileges accorded by the laws to all other persons in that respect.

XXVI.

System adopted by said board violates rules of equality.

That the State Board of Equalization in making said pretended assessment of the said roadway of defendant did willfully and designedly include in the valuation of said roadway the value of fences erected upon the land of coterminous proprietors; and did willfully and designedly value the said roadway at a greater value than the

value of other property similarly situated, and greater than its actual value, upon the ground that such increased valuation should be made because the title of defendant thereto was acquired by condemnation.

That the value of such fences which were not the property of defendant nor the property of the owners of said roadway, and the increased value affixed to the roadway by the system adopted by the board, are blended in said pretended assessment, and that there is no mode or means by which such illegal valuation can be separated from those which may be legal.

Defendant, upon its information and belief, avers that the said State Board of Equalization adopted a system of valuation in respect to all the property mentioned and referred to in section 10 of article XIII of the Constitution, which defines the power of said
18 board, which system was by said board intended to and which did operate unequally, and which was intended to and did violate the rule prescribed by said section—that all of such property should be assessed at its actual value. That the system so adopted was applied by the said board in making said pretended assessment of the said property, and in making the assessment of all property in the State over which the preteneded authority of said board extended.

That said system was to include within the value of the roadway the value of the fences owned and possessed by coterminous proprietors, and to value said roadway at double its actual value, because the right thereto was acquired by condemnation. That said system relative to the rolling-stock of railroads was to value the same at sixty per cent. above its actual cost when new, and to value such rolling-stock at double its actual value. That said system, relative to the franchise, was to value it at $2,000 per mile, when the actual value, as the board well knew, of said franchise as an entirety did not exceed twenty-five dollars. That said system as to the valuation of other property to be assessed by the said board was to value it at double its actual value. That the said system was by the said board adopted and was by it applied in making all assessments made by it with the intent and purpose wrongfully and unlawfully to cause the persons and property assessed by it to pay double the rate of State and county taxes paid by the owners of property assessed by the local authorities. And defendant avers upon its information and belief, that the said board applied the said system in making the pretended assessment against the property upon which the taxes mentioned in the complaint are based. And defendant, upon its information and belief, avers that the said State Board of Equalization, in making said pretended assessment, did not value any of said property at its actual value, but did intentionally, and for the purpose of making defendant pay an unequal proportion of State and county taxes, assess the said property at double its actual value. And defendant avers that the general rule in this State has been to assess property at not over two-thirds its cash or actual value, and that this rule was adopted and acted upon by all local assessors in the State, and by the said State board, except in the exercise of the power con-

ferred by section 10, art. XIII of the State constitution for said fiscal year, and that all property save that assessed by the said State Board under said section, has been valued and assessed at one-third less than its actual value, and that the taxes have been collected on valuations so made.

XXVII.

Defendant's franchise a Federal one.

And defendant, upon its information and belief, avers that under and by virtue of the said several acts of Congress, defendant became, and ever since has been, a Federal corporation, and has held its franchise and exercised all its corporate powers under the Government of the United States.

XXVIII.

Corporate powers in part derived from acts of Congress.

And defendant, upon its information and belief, avers that if, by virtue of the several acts of Congress herein referred to, it did not become a Federal corporation, yet it holds under the Government of the United States all the corporate powers and franchises granted to it by the said several acts of Congress as the trustee of the said Government, and for the governmental uses and purposes specified in said acts.

XXIX.

That the franchise of defendant is not subject to State taxation.

That under and by virtue of the said several acts of Congress hereinbefore referred to the plaintiff was by the Government of the United States selected as the means and instrument of that Government to construct the railroad hereinbefore described, and to keep and maintain the same in repair, to the end that the said Government might, when occasion required, use the same for the transportation of its armies and military stores, and for such other purposes as said Government might, in the execution of its powers, desire to use the same. That the Government of the United States has never given to the State of California the right to lay any tax upon the franchise, existence, or operations of defendant. That such a tax would hinder and impede the lawful operations of the Government of the United States; would hinder, delay, and prevent the defendant from performing, as aforesaid, its obligations to the United States, and would nullify and prevent the enforcement of the said several acts of Congress.

19 XXX.

Whole franchise assessed.

That the said pretended assessment made by the State Board of Equalization is upon the whole of the franchises of defendant, and

that the said board, in valuing the same, included the value of all the franchises held and corporate powers exercised by defendant under said acts of Congress.

XXXI.

Tax upon the franchise blended with tax upon other property.

That the State Board of Equalization, in making said pretended assessment, included and assessed the franchise of defendant, and in making said pretended apportionment included in the valuation affixed to the property of defendant the value thereof, but such value is not separately stated in said apportionment, nor upon any assessment roll or delinquent list of said county, but such value is in said pretended apportionment and upon the assessment roll and delinquent list of said county blended with the values affixed to the roadway, road-bed, etc., and cannot on either be distinguished or separated from such other values, and that the tax upon said franchise is in like manner blended with and cannot be separated from the tax on said roadway, road-bed, etc.

XXXII.

Valuation excessive.

Neither the franchise, roadway, road-bed, rails or rolling-stock were assessed by the State Board of Equalization in said pretended assessment at their actual value, or in proportion to their value, but were wilfully and intentionally assessed greatly in excess and out of proportion to such value, and greatly in excess of and out of proportion to the rate at which all other property in said State is valued, for the purposes of taxation, to wit, one hundred per cent. in excess thereof.

XXXIII.

Sole authority upon which tax is based.

Said pretended assessment is the only assessment of said property, and the pretended tax, for non-payment of which this action is brought, is founded upon said pretended assessment and upon no other assessment.

XXXIV.

County tax not the same in all townships and districts.

The defendant, upon its information and belief, avers that the tax levied by the Board of Supervisors for said fiscal year was not fixed at the same rate in every township and district in said county. And defendant, upon its information and belief, avers that said tax was levied by said board without authority of law, and that the same was illegally placed upon said assessment roll or book, and delinquent list without authority. That upon the assessment roll and

delinquent list of said county, the said several taxes, State, county, township and district, are blended and cannot be separated.

XXXV.

State tax void.

And defendant, upon its information and belief, avers that the State Board of Equalization never at any time did for the said fiscal year fix or determine any rate of taxation for State purposes, and that the sum and the whole thereof claimed in the complaint for State taxes for said fiscal year is illegal and void.

And for further and separate answer defendant avers:

XXXVI.

Plaintiff's causes of action based upon assessment by State Board of Equalization.

That on — day of May, 188–, the State Board of Equalization of the State of California, pretending to act under and by virtue
20 of the powers conferred upon it by section ten of article XIII of the constitution of the State of California, did make a pretended assessment for the purposes of taxation for the fiscal year of said State then next ensuing upon the franchise, roadway, road-bed, rails, and rolling stock of the railroad hereinbefore described and known as the Southern Pacific railroad, against this defendant; that said pretended assessment was made separately upon the franchise, roadway, road-bed, rails, and rolling stock of said railroad, and was then and there so entered upon the minutes of said board; that the said pretended assessment is the assessment upon which the several taxes mentioned in plaintiff's complaint are claimed to be due, and that no other assessment than such pretended assessment was ever made against or upon said property or any part thereof.

XXXVII.

Property not assessed to the owner.

That at the time said pretended assessment was made Loyd Tevis and D. O. Mills were, and for more than three years prior thereto had been, the owners and claimants of all the franchises, roadway, road-bed, rails, and rolling stock of said Southern Pacific railroad, and of all the property, real and personal, against or upon which said pretended assessment was made; that said property was by the defendant duly and lawfully conveyed to the said Mills and Tevis on the first day of April, 1875, by a conveyance duly acknowledged and entitled to record, and which was afterwards, to wit, within said year 1875, duly recorded in the proper book in the recorder's office in each of the counties into and through which said road
21 runs or is situated; that said conveyance ever since has been and still is of record as aforesaid and in full force and effect; that under and by virtue of the provisions of section 863 of the Civil

Code of California, and the provisions of section 2924 of said Code as amended in 1874, said conveyance transferred to the said Mills and Tevis the whole estate of defendant in said property, and from thence hitherto, by reason of said conveyance and said provisions of the said Code, the defendant has had no estate or interest in said property or any part thereof.

And defendant avers that at the time said pretended assessment was made the Central Pacific Railroad Company, a corporation duly organized and existing, was, and for more than three years prior thereto had been, in the full, open, and notorious possession and control of all of said property lying or being within the counties of Kern, Fresno. Tulare, Los Angeles, San Bernardino, and San Diego, or in either of said counties.

22 And defendant avers that at the time said pretended assessment was made the defendant was not, nor had it been for more than three years prior thereto, the owner or claimant of the said Southern Pacific railroad, or of any part or portion of the property upon or against which pretended assessment was made, nor was it at the time said pretended assessment was made, nor at any time within three years next preceding the time of the making of said pretended assessment, in the possession of, or control of, said property, or any portion thereof, situated within the said counties last above mentioned, or within either of them.

Wherefore defendant prays it be hence dismissed, with costs.

P. D. WIGGINTON,
Attorney for Defendant.

CREED HAYMOND, *Of Counsel.*

23 *Verification.*

STATE OF CALIFORNIA, } ss:
City and County of San Francisco, }

J. L. Willcutt, being first duly sworn, on oath says: That he is an officer, to wit, the secretary of the corporation defendant herein; that he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge, except as to those matters therein stated on his own information or belief, and as to those he believes it to be true.

Subscribed and sworn to before me, this 31st day of March, A. D. 1882.

[SEAL.] CHARLES J. TORBERT,
Notary Public in and for the City and County of San Francisco, State of California.

Endorsed: Due service of the within answer admitted this 14th day of April, 1882. C. W. C. Rowell, attorney for plaintiff. Filed April 14th, 1882. A. F. McKenney, clerk, by David Wolf, deputy.

24 I hereby certify the foregoing to be a full, true, and correct copy of the answer on file in my office in the above-entitled action.

In witness whereof, I have hereunto set my hand and affixed the seal of the above-named court, this 14th day of April, 1882.

[SEAL.] A. F. McKENNEY, *Clerk*,
By DAVID WOLF, *Deputy Clerk*.

25 *Petition.*

In the Superior Court, County of San Bernardino, State of California.

THE COUNTY of SAN BERNARDINO, Plaintiff,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY, a Corporation, Defendant. } No. 330.

To the honorable the superior court in and for the county of San Bernardino, State of California:

Your petitioner, The Southern Pacific Railroad Company, def't, respectfully shows:

That your petitioner is the sole defendant in the above-entitled action now pending in this honorable court.

That said action was brought on the 11th day of March, 1882, the complaint therein having been duly filed on said date.

That the defendant has on this day, and before the filing of this petition, appeared in said action, and filed an answer to the complaint of plaintiff.

That no term of this court has been held since this action; and this petition is filed before the term at which the cause could be first tried.

That no trial of said action has been had, and this petition is filed before the trial thereof.

That said action is a suit of a civil nature at law, and arising under the Constitution and laws of the United States, and that the matter in dispute exceeds, exclusive of costs, the sum and value of five hundred dollars.

That said action is brought by the plaintiff to recover from the defendant on account of taxes claimed by the plaintiff to be due and payable from the defendant for State and county purposes, as will more fully appear by a reference to the plaintiff's complaint on file herein.

26 That the assessment described in the complaint and answer, and which the plaintiff in this action claims to be due and payable, is an assessment which the State Board of Equalization of the State of California pretended to make under and by virtue of the authority conferred upon the board by section 10 of article XIII of the State constitution.

That the defendant claims in this action that said provisions of the constitution of the State of California, and the authority thereby conferred upon said State Board of Equalization, violate the provisions of the Fourteenth Amendment to the Constitution of the United States, in this, that its effect is to deprive the defendant of its property without due process of law, and that under it the de-

fendant is denied any protection from the general laws of the State of California, which—

First. Require that property shall be taxed in proportion to its value;

Second. Require such proportions to be ascertained by a general law;

Third. Require, before the liability is fixed, that the right to be heard must be given;

Fourth. Which give an appeal from the assessor to another tribunal;

Fifth. Require the assessment to be made in the county, and prevent its being made in localities distant from the *situs* of the property;

Sixth. Prescribe the mode and manner of the assessment; and

Seventh. Which allow deductions from indebtedness secured by mortgage;

Eighth. Which require property to be assessed at its actual value.

That in the assessment and apportionment described and mentioned in the answer the franchise of the defendant and the whole thereof is included in the valuation, and so blended with the other assessments and valuations that it cannot be distinguished therefrom; and defendant claims in this action that under and by virtue of the acts of Congress of July 27th, 1866, and March 3d, 1871 (which acts are referred to in said answer), the defendant was by the Government of the United States selected as an instrument and means of that Government to carry into execution the said several acts of Congress; and defendant further claims in this action that under and by virtue of said several acts of Congress the State has no power to impose a tax upon the franchise or operations of defendant, and that such tax violates the provisions of said several acts of Congress.

That prior to the 1st day of January, 1881, the defendant was indebted to divers persons, citizens of the United States, and many of them then and now citizens and *bona fide* residents of the State of California, and others of them then and now citizens and *bona fide* residents of other States of the Union, in large sums for moneys advanced to construct and equip its railroad described in the answer herein. That to secure the payment of such indebtedness the defendant long prior to the said day executed and delivered a mortgage upon its railroad and all rolling-stock and appurtenances, and upon a large number of tracts of land situated in different counties of the State of California, which said tracts of land then were, and ever since have been, the property of defendant. That said indebtedness exceeded and still exceeds three thousand dollars per mile of said road. That no part thereof has ever been paid except the accruing interest, and that the whole thereof is now, and since the execution of said mortgage has been, a valid and subsisting indebtedness against said company defendant, and has been, and still is, secured by said mortgage.

That the said pretended assessment made as aforesaid by said State Board of Equalization included the whole value of said prop-

erty without any deduction therefrom. That under the constitution of the State of California, when property other than property such as is described in the complaint is assessed and valued for the purposes of taxation, it is the duty of the assessor making such valuation to deduct from the value of such property all indebtedness secured by mortgage or lien upon the property. That the supreme court of the State of California, the highest tribunal in said State, has decided that defendant (and others similarly situated) is not entitled to the protection of the Fourteenth Amendment of the Constitution
27 of the United States, is not a means or instrument of the Federal Government; that its franchise is assessable and subject to taxation without the consent of the Federal Government, and that defendant and others similarly situated are not entitled to the reduction hereinbefore referred to; that said decision of the supreme court of the State of California is in full force and is binding upon the inferior courts of the State, and especially upon this court; that the facts stated in the answer herein are true, which answer defendant refers to and makes part of this petition; that defendant is the corporation mentioned in the said several acts of Congress hereinbefore referred to, and that the railroad of defendant, which has been assessed by the State Board of Equalization, is the road constructed, operated, and maintained by defendant under the said several acts of Congress; that the plaintiff in said action will rely upon the decision of the supreme court of the State of California, and that the construction of said several acts of Congress and of the Fourteenth Amendment to the Constitution of the United States is in this action disputed, and must necessarily be adjudged and determined herein; and that if said adjudication and determination be in favor of defendant and against that heretofore made by the supreme court of the State of California, such adjudication and determination will be conclusive in favor of defendant upon the merits of this action; that this is a suit arising under the Constitution and laws of the United States.

That your petitioner has made and filed with this petition a bond in the penal sum of five thousand dollars, with good and sufficient surety, conditioned that your petitioner shall enter in the circuit court of the United States, to be held in the district of California, in the ninth circuit, on the first day of its next session, a copy of the record in said suit, and shall pay all costs that may be awarded by the said circuit court if said court shall hold that said suit was wrongfully or improperly removed thereto, and also shall appear in said circuit court and enter special bail in said suit if special bail was originally requisite therein, and shall do all such other and further appropriate acts as by the act of Congress approved March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes," are requisite to be done upon removal of a suit in a circuit court of the United States from a State court; and your petitioner is ready and willing to give such other and further bonds and to do all such other acts as may be lawfully required.

Your petitioner therefore prays that this honorable court will accept this petition and said bond and proceed no further in said suit, and that said suit may be removed into the circuit court of the United States in and for the district of California, in the ninth circuit, as required by statute of the United States in such cases made and provided.

And your petitioner will ever pray, etc.

T. D. WIGGINGTON,
Attorney for Petitioner.

CREED HAYMOND, *Of Counsel.*

Endorsed: Filed April 14th, 1882. A. F. McKenney, clerk, by David Wolf, deputy.

I hereby certify the foregoing to be a full, true, and correct
28 copy of the petition for transfer to circuit court, on file in my office, in the above entitled action.

In witness whereof, I have hereunto set my hand and affixed the seal of the above-named court, this 14th day of April, 1882.

[SEAL.] A. F. McKENNEY, *Clerk*,
By DAVID WOLF, *Deputy Clerk.*

29 *Bond.*

In the Superior Court, County of San Bernardino, State of California.

THE COUNTY OF SAN BERNARDINO, Plaintiff,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY, a Corporation, Defendant. } No. 330.

Know all men by these presents, that we, The Southern Pacific Railroad Company, as principal, and Charles Crocker and Leland Stanford, as sureties, are held and firmly bound unto the county of San Bernardino, plaintiff herein, in the sum of five thousand dollars, to be paid to the said plaintiff; for which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, and administrators, jointly and severally firmly by these presents.

Sealed with our seals and dated this 31st day of March, 1882.

Whereas the above-entitled action was brought, on or about the 11th day of March, 1882, in the superior court in the county of San Bernardino, State of California, and the same is now pending in said superior court by said The County of San Bernardino, plaintiff, against said defendant, and is removable into the circuit court of the United States in and for the district of California, in the ninth circuit, under and by that certain act of Congress of the United States approved March 3, 1875, entitled "An act to determine the jurisdiction of circuit courts of the United States and to regulate the removal of causes from State courts, and for other purposes;"

And whereas said The Southern Pacific Railroad Company, defendant, has made, and is about to file herewith, its petition in said

suit in said superior court in and for the county of San Bernardino, State of California, for the removal of said suit into said circuit court of the United States, to be held in the said district of California, in the ninth circuit:

Now, the condition of this obligation is such, that if said The Southern Pacific Railroad Company shall enter in such circuit court of the United States on the first day of its next session a copy of the record in said suit, and shall pay all costs that may be awarded by the said circuit court if said court shall hold that such suit was wrongfully or improperly removed thereto, and also shall there appear and enter special bail in such suit if special bail was originally requisite therein, and shall do all such other appropriate acts as by the said act of Congress are required to be done upon the removal of a suit from a State court into the circuit court of the United States, then this obligation to be void; otherwise, to remain in full force and virtue.

[SEAL.] SOUTHERN PACIFIC RAILROAD CO.,
By J. L. WILLCUTT, *Secretary.*
CHAS. CROCKER. [SEAL.]
LELAND STANFORD. [SEAL.]

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

Charles Crocker and Leland Stanford, the sureties in the foregoing obligation, being duly sworn, each for himself says: That he is a resident of the State of California and a freeholder therein, and is worth the sum of five thousand dollars over and above all his just debts and liabilities, exclusive of property exempt by law from execution.

CHAS. CROCKER.
LELAND STANFORD.

Subscribed and sworn to before me, this 31st day of March, A. D. 82.
[SEAL.] CHARLES J. TORBERT,
Notary Public.

I hereby approve of the above sureties, and accept and approve the following bond.

Dated April 15th, 1882.

A. C. ROLFE,
Judge Superior Court San Bernardino County, California.

Dated April 14th, 1882.

I hereby certify the foregoing to be a full, true, and correct copy of the bond on file in my office in the above-entitled action.

In witness whereof, I have hereunto set my hand and affixed the seal of the above-named court, this 15th day of April, 1882.

[SEAL.] A. F. McKENNEY, *Clerk,*
By DAVID WOLF, *Deputy Clerk.*

32 *Clerk's Certificate.*

STATE OF CALIFORNIA, }
County of San Bernardino, } *ss:*

I, A. F. McKenney, county clerk and *ex officio* clerk of the superior court of the State of California in and for the county of San Besnordino, do hereby certify that the foregoing contains a true, full, and correct transcript of the following documents or papers in the foregoing entitled action, to wit, summons, complaint, answer, petition for transfer to circuit court and bond, together with all endorsements thereon, and I do further certify that the foregoing is a copy of the whole of the record in said action on file in my office.

Witness my hand and the seal of said superior court, affixed this 21st day of April, A. D. 1882.

[SEAL.]

A. F. McKENNEY, *Clerk,*
By DAVID WOLF, *Deputy.*

33 Endorsed: In the circuit court of the United States for the district of California. Transcript of record. Filed April 28th, 1882. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

34 *Amended Answer.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

THE COUNTY OF SAN BERNARDINO, Plaintiff,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY, Defendant. } No. 2757.

Now comes the defendant, and by leave of the court first had and obtained files this its amended answer:

I.

It denies each and every allegation in said complaint had, made, or contained.

Denies that the defendant is a corporation organized or existing under the laws of the State of California, or organized or existing other than as is in this answer averred, and denies that defendant is indebted to plaintiff in any sum whatever, or that there are any taxes due the plaintiff with or without percentage added, or that there is any penalty, costs, or interest due the plaintiff, or that any taxes were ever assessed or levied upon any property of defendant described in said complaint for the fiscal year mentioned in said complaint, or that any of the property mentioned in said complaint was ever assessed for said fiscal year for any sum or in any manner whatever, or that any taxes were assessed or levied against any of said property for said fiscal year.

Denies that during said fiscal year, or at any other time, defendant had in operation 711.56 miles of road, or any greater number of miles than 706.18 miles.

Defendant refers to and makes part of this subdivision the matter stated in subdivisions 2 to 39 of this answer.

35 And for further and separate answer defendant avers as follows:

II.

Defendant a corporation—Its place of business—Line of road—Stockholders.

The defendant is a corporation existing under the laws of the United States and of the State of California (as will hereafter more fully appear). The principal place of business of defendant now is, and for many years last past has been, in the city of San Francisco, State of California. Some of its stockholders and members now are, and ever have been, citizens of the United States, resident in said State of California; and some of its stockholders and members now are, and ever have been, citizens of the United States, resident in States other than the State of California. In the year 1868 it was duly organized under an act of the Legislature of the State of California, approved May 20th, 1861, entitled "An act to provide for the incorporation of railroad companies and the management of the affairs thereof, and other matter relating thereto;" and the term of its existence was fixed at fifty years from the date of its organization; and it is still a corporation duly organized under said law, except in so far as its organization, existence, and character may be affected or modified by the Federal statutes hereinafter referred to.

III.

S. P. R. R.—The uses and purposes thereof.

As such corporation, it constructed a line of railroad, and procured the rolling stock and all appurtenances thereunto belonging, known and designated as the Southern Pacific Railroad (of California), described as follows: Commencing on the waters of the Pacific Ocean, in the city and county of San Francisco, and extending in a southerly direction through portions of the county of San Francisco, and through the county of Santa Clara to Tres Pinos, in the county of San Benito, with a branch therefrom running from Carnadero, in the county of Santa Clara, to Soledad, in the county of Monterey. Said line of railroad also extends from Huron, in Fresno county, to Goshen, in Tulare county, and thence in a southerly direction by way of Tehapechi Pass, Mojave, and Los Angeles, to the Colorado river at Fort Yuma, with three branches from said line at Los Angeles, extending, respectively, to Santa Monica, Wilmington, and Santa Ana, in the county of Los Angeles. Said line of railroad is connected with the Texas & Pacific railroad at Sierra Blanca, in the State of Texas, by three railroads, to wit, the Southern Pacific railroad (of Arizona), extending from Fort Yuma to the eastern boundary line of Arizona, the Southern Pacific railroad (of New Mexico), extending from said eastern boundary line across New Mexico to the

western boundary of Texas, and the Galveston, Harrisburg and San Antonio railroad, extending from said last-named boundary to Sierra Blanca. Said several railroads are operated as one continuous line from a point near Marshall, in Texas, to the Pacific Ocean at San Francisco, for the uses and purposes and in the manner contemplated by the acts of Congress hereinafter referred to.

From Tres Pinos to Huron the said Southern Pacific railroad has not been completed, but, pending its construction, connection between said points is made over the lines of the Central Pacific railroad. Defendant has not completed the construction of the road from said Southern Pacific railroad to the Colorado river, at or near the Needles, to connect with the Atlantic & Pacific railroad, hereinafter referred to, but has the construction thereof under contract, and will soon have completed a road from Mojave, on the line of said Southern Pacific railroad, to the said point on the Colorado river, there to connect with said Atlantic & Pacific, and with the said Atlantic & Pacific, when completed, making a continuous line from Springfield, in the State of Missouri, to the Pacific Ocean, as contemplated by the act of Congress, hereinafter referred to, chartering the Atlantic & Pacific Railroad Company.

IV.

Length of the road in the several counties.

Of said Southern Pacific railroad (of California) there had been, prior to the first Monday in March, 1880, completed, and there was in operation in the several counties through which it runs, 711.51 miles, to wit: In the city and county of San Francisco, 7.36 miles; in the county of San Mateo, 25.10 miles; in the county of Santa Clara, 59.30 miles; in the county of Santa Cruz, 2.15 miles; in the county of San Benito, 17.65 miles; in the county of Monterey,
36 49.28 miles; in the county of Fresno, 17.93 miles; in the county of Tulare, 61.98 miles; in the county of Kern, 117.83 miles; in the county of Los Angeles, 139.48 miles; in the county of San Bernardino, 54.60 miles, and in the county of San Diego, 158.85 miles, and all within the State of California.

V.

Act of Congress of July 27th, 1866—Atlantic and Pacific act.

On the 27th day of July, 1866, the Government of the United States undertook to construct, or cause to be constructed, a line of railroad from a point at or near the town of Springfield, in the State of Missouri, to the headwaters of the Colorado Chiquito, and thence along the thirty-fifth parallel of latitude, as near as might be found suitable for a railroad route, to the Colorado river, at such point as might be selected, and thence by the most practicable and eligible route to the Pacific Ocean; and to that end Congress passed an act, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," which act was approved on said 27th day of July, 1866, and

to said act defendant here refers by title, and makes it part of this answer. (See United States Statutes at Large, vol. 14, page 292.) By said act certain persons therein named were made and erected into a corporation, under the name and style of the "Atlantic & Pacific Railroad Company."

VI.

Intent of Congress in passing act of 1866.

The intent and purpose of Congress in passing said act was to secure the completion of a railroad from the Missouri river to the Pacific Ocean, with a branch to San Francisco, and to secure the use thereof for all time to come to the Government of the United States for the transportation of its mails, troops, munitions of war, and public stores.

VII.

Like privileges and immunities granted to defendant.

To facilitate the construction of said road the Government of the United States, by said act of Congress, adopted the defendant as the instrument or agent of the United States, and conferred upon defendant the same powers and clothed defendant with the same privileges and immunities which it conferred upon and clothed the Atlantic & Pacific Railroad Company with, except that the said defendant was to construct only that portion of said railroad between the Colorado river and the city and county of San Francisco.

VIII.

Acceptance of the conditions.

Said Atlantic & Pacific Railroad Company organized under said act, and obtained *bona fide* subscriptions to the stock of said company to the amount of one million dollars, with ten per centum paid within two years after the passage and approval of said act of Congress; and said company and defendant, immediately after the passage of said act, accepted the terms and conditions thereof, and have duly complied therewith.

IX.

Roads constructed under said act.

Said Atlantic and Pacific Company has nearly completed, and will within a short time have fully completed, the whole of said road from Springfield to the Colorado river; and defendant has constructed said road as aforesaid to Mojave, with the exception hereinbefore set out, and is prosecuting the construction thereof from said Mojave to a junction with the road of the Atlantic & Pacific Company at the Colorado river, and that the whole of said road will be completed and in operation within the present year.

X.

Act of Congress of March 3d, 1871—Texas Pacific act.

On the 3d day of March, 1871, the Government of the United States undertook to construct, or cause to be constructed, a line of railroad from Marshall, in the State of Texas, to San Diego, in the State of California, and from said line of road at the Colorado
37 river to construct, or cause to be constructed, a line of railroad which would connect the road from Marshall to San Diego with the line of road provided for in the act of Congress of July 27th, 1866, hereinbefore referred to, and by means of said connecting road to connect the road from Marshall to San Diego with the city of San Francisco; and to that end Congress passed an act, entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," approved March 3d, 1870; and subsequently, on the 2d day of May, 1872, passed an act, entitled "An act supplementary to an act entitled 'An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes,'" approved March 3d, 1871. To said acts defendant here refers by title, and makes them part of this answer. (See vol. 16, U. S. Statutes at Large, 573; vol. 17, *Id.*, 59.)

XI.

Provisions of said acts accepted by the Texas Pacific Railroad Company and by defendant—their work thereunder.

Immediately after the passage of said act of March, 1871, the Texas Pacific Railroad Company was organized in pursuance thereof, and it and defendant accepted all the terms and conditions of each of said acts of 1871 and 1872, and have fully and in every respect complied therewith, and under them and in compliance with the spirit and intent of said acts have completed the roads mentioned in the third subdivision of this complaint.

XII.

Intent of Congress in passing the acts of 1871 and 1872.

The purpose of Congress in passing said acts was to insure the transportation of the mails, troops, munitions of war, supplies and stores of the United States, and to that end Congress expressly declared in said acts that no act of said companies, or either of them, nor any law of any State or Territory, should ever impede, delay, or prevent said companies, or either of them, from performing their obligations to the United States in that regard.

XIII.

The State of California confirms and vests in the Southern Pacific Railroad Company the rights, privileges, franchises, power, and authority granted to or vested in said company by the several acts of Congress.

On the 4th day of April, 1870, the Legislature of the State of

California passed an act entitled "An act to aid in giving effect to an act of Congress relative to the Southern Pacific Railroad Company." By the terms of said act, and to enable said company to comply with the act of Congress of July 27th, 1866, hereinbefore pleaded, and all other acts of Congress then in force, or which might thereafter be enacted, it was provided that the right to construct, maintain, and operate by steam or other power the said railroad mentioned in said acts of Congress, and all the rights, privileges, franchises, power, and authority conferred upon or granted to or vested in said company by the said acts of Congress, and any acts of Congress which might thereafter be enacted, should be confirmed and vested in the defendant. Said act now is and ever since said 4th day of April, 1870, has been in full force and effect. (Statutes 1870, p. 883.)

XIV.

Indebtedness of defendant secured by mortgage.

On the 1st day of April, 1875, the defendant was indebted to divers persons, citizens of the United States, and many of them then and now citizens and *bona fide* residents of the State of California, in large sums of money advanced to construct and equip the railroad hereinbefore described. To secure the payment of such indebtedness the defendant, on the said first day of April, 1875, executed and delivered a mortgage upon said Southern Pacific Railroad, its franchises and all rolling stock and appurtenances, and upon a large number of tracts of land, aggregating over eleven million of acres, situated in different counties in the State of California, which said tracts of land then were and ever since have been the property of defendant. Said indebtedness amounts to the sum of forty-six million of dollars, and no part thereof has ever been paid except the accruing interest, and the whole thereof is now and since the execution of said mortgage has been a valid and subsist-
38 ting indebtedness against said company, and has been and still is secured by said mortgage, a copy of which, with the endorsements thereon, is hereunto annexed and made a part hereof, marked Exhibit "A."

XV.

Mortgaged lands—Mode and manner of assessment—Payment of taxes.

The lands mentioned in the preceding subdivision are not, and never have been, in any way connected with the railroad business of the defendant. They are agricultural and grazing lands, held, owned, and used for farming and grazing purposes, and are situated as follows in the counties of the State of California, and are distributed in the respective counties in the following quantities: In Santa Clara county, 3,138 acres; San Benito county, 1,879 acres; Monterey county, 1,879 acres; Stanislaus county, 32,242 acres; Merced county, 20,655 acres; Fresno county, 18,789 acres; Tulare county, 260,315 acres; Kern county, 168,096 acres; Los Angeles county, 38,033 acres;

San Bernardino county, 30,686 acres; San Diego county, 5,787 acres.

Said lands and all of them for each of the years 1880, 1881, and 1882 were assessed by the assessors of the respective counties in which they are situated at their full cash value, and no deduction from said value was made or allowed on account of said mortgage or the indebtedness secured thereby; on the contrary, the laws of the State of California under which said assessors acted in making said assessments prohibited any deduction from said values on account either of the mortgages or the indebtedness secured thereby.

In each of said years the defendant paid in full, at the time the same became payable, all the taxes levied upon said lands, amounting, in the aggregate, for State, county, and municipal purposes, to $92,442.49.

The laws of the State of California, then and ever since in force, provide that in the assessment and valuation of lands of like character and situation, and in every respect similar both in quality and use, not owned by railroad or other quasi-public corporations, a mortgage thereon by which a debt is secured shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby, and that in the assessment and valuation of such property for the purposes of taxation the value of said mortgages shall be deducted therefrom, and the owner of said lands or property only assessed and taxed for the value in excess of the value of the mortgage.

To assist the assessor in the performance of his duties, and to enable him to make the deductions aforesaid, the laws of the State of California make it the duty of the recorder of each county annually, on or before the first Monday in April, to transmit to the assessor a complete abstract of all mortgages by which any debt is secured remaining unsatisfied on the records of his office at 12 o'clock meridian on the first Monday of March of said year; and it is further provided by said laws that should any such list be found to contain any instrument relating to lands situated in more than one county, it shall be the duty of the assessor to transmit to the State Board of Equalization all information relating thereto, and it shall be the duty of the State board to attach an apportionment of valuation of such instrument to be assessed in each county, and to transmit to the assessor of each county mentioned as affected in said instrument a statement of valuation of assessment to be levied against said instrument in such county. (Political Code, sect. 3678.)

In the matter of the valuation of its said lands for the purposes of taxation the defendant is, and ever has been, deprived of all the benefits of the said laws which provide for the deduction of indebtedness secured by mortgage from the valuation of lands by reason of the provisions of section 4 of article XIII of the constitution of the State of California, and the action of assessors in pursuance thereof; while all natural persons and all corporations, not quasi-public, within the State of California, are entitled to receive, and do receive, the full benefit of said laws, and the deductions required to be made thereunder.

XVI.

Assessment by State Board of Equalization.

On the 2d day of May, 1880, the State Board of Equalization of the State of California, pretending to act under and by virtue of the powers conferred upon it by section ten of article XIII of the constitution of the State of California, did make a pretended assessment for the purposes of taxation for the fiscal year of said State then next ensuing upon the franchise, roadway, road-bed, rails, and
39 rolling stock of said railroad against defendant. Said pretended assessment was made separately upon the franchise, road way, road-bed, rails, and rolling stock of said railroad, and was then and there so entered upon the minutes of said board. Said assessment is the assessment upon which the several taxes mentioned in the complaint herein are based: and no other assessment than the aforesaid was ever made of said property, or any part thereof, for said fiscal year.

XVIII.

State Board never apportioned assessment.

Defendant avers, upon its information and belief, that either said pretended assessment nor any assessment against defendant in respect to said property, or any part thereof, was ever entered upon any assessment roll or book of said county, or upon any delinquent list of said county, nor was any enty relative to the action of the said State Board of Equalization in respect to the assessment or apportionment of said property, or any part thereof, ever entered upon said assessment roll or book, except a letter from the State Board of Equalization, addressed to the assessor of said county, which letter did not contain said assessment or any part thereof, nor a copy of said assessment or any part thereof, nor did it contain any apportionment thereof, as provided for in section 10 of article XIII of the constitution of the State of California, hereinbefore referred to or otherwise.

XIX.

No assessment was ever made or entered on the assessment roll.

Defendant, upon information and belief, avers, that neither said pretended assessment nor any assessment against this defendant, or any other person or persons, in respect to the said property, or any part thereof, was ever entered upon any assessment roll or book of said county, nor upon any delinquent list of said county, nor was any entry relative to the action of the said State Board of Equalization in respect to the assessment or apportionment of said property of defendant, or any part thereof, ever entered upon said assessment roll or book, except the said letter of the said State Board of Equalization. Said letter was copied by the assessor of said county on or about the 1st day of June, 1880, upon the assessment. Upon said assessment roll opposite said letter is entered in figures, $720,149.00, and opposite said figures, under the head of taxes due, is entered in

figures $13,394.89. The same entries, and no others, appear upon the delinquent list of said county for said fiscal year. As defendant is informed and believes, and upon such information and belief, charges the truth and fact to be there are in respect to said propety, and in respect to defendant, no other or further entries upon any assessment roll, book, or delinquent list of said county.

XX.

State board pretended to assess the whole of said property to defendant.

The State Board of Equalization, in making the said pretended assessment, pretended to assess to and againtst defendant the full cash value of said railroad, roadway, road-bed, rails, rolling stock, and franchises, without deducting therefrom the value of the mortgage, or any part thereof, given and existing thereon as aforesaid to secure the indebtedness of said company to the holders of said bonds, notwithstanding, as defendant avers, they had full knowledge of the existence of such mortgage.

40 XXI.

State board did not treat said mortgage as an interest in the property.

In making said pretended assessment the said State Board of Equalization did not deem or treat said mortgage as an interest in said property, but did assess the whole value of said property to the defendant in the same manner it would have done had there been no mortgage thereon.

XXII.

Pretended assessment and apportionment made before any other assessments in the State.

At the time the said pretended assessment and said pretended apportionment was made by the State Board of Equaization no assessment book or roll for the said fiscal year had been completed, or was in existence, nor had a single assessment or valuation for the purposes of taxation for said fiscal year been ascertained or fixed as provided by law or otherwise, and that said board, in making said valuation and apportionment, neither did nor could exercise any of the powers relative to the equalization of values for the purposes of taxation.

XXIII.

Authority exercised by State board violates provisions of Fourteenth Amendment.

Under the constitution of the State of California the board of supervisors of the several counties of the State constitute boards of equalization for their respective counties, whose duty it is to equalize the valuation of the taxable property in the county, except the

franchise, roadway, road-bed, rails, and rolling stock of railroads operated in more than one county of the State, and to such boards the owners of all property, except as above stated, have the right and privilege to apply for the correction of their assessments, and have the right and privilege of a hearing before the said local boards of equalization. By the provisions of the constitution of California, and the laws in pursuance thereof, this right and privilege, or any right or privilege, to be heard in relation to assessments is denied to defendant in respect to the property in question. All of which defendant avers is contrary to the provision of the Fourteenth Amendment to the Constitution of the United States, which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws.

XXIV.

Further violation of the Fourteenth Amendment.

The power conferred upon the State Board of Equalization by section ten of article XIII of the constitution of California violates the provisions of the Fourteenth Amendment to the Constitution of the United States, which declares that no State shall deprive any person of life, liberty, or property without due process of law; for that said section, as to such power, is self-executing and complete, and does not provide for personal or other notice to be given to the parties to be affected by the exercise of such power; and does not provide for a full or any opportunity of time, place, or tribunal for such parties to be heard in defense of their rights; and hence, under and by said provision of the constitution of the State of California, the liability of owners of such property to taxation, and the amount thereof, may be fixed without notice to them or an opportunity to be heard.

XXV.

Further discrimination.

The provisions of section four of the constitution of the State of California, providing for the assessment of the property of railroad and other quasi-public corporations, is in contravention of the provisions of said Fourteenth Amendment of the Constitution of the United States, in that it discriminates against such corporations; in this, that whereas, under said section four of said article XIII of the constitution of the State of California, if the property of natural persons or corporations, not quasi-public, has a mortgage, lien, or incumbrance thereon, they are not liable to assessment or taxation upon such property, but only upon the value of their interest in such property over and above the value of such mortgage, lien, or incumbrance; whereas, in the case of the property of railroad and other quasi-public corporations, no such allowance or deduc-
41 tion is made, had, or allowed with respect to any mortgage, lien, or incumbrance there may be upon such property; and also in this, that while the tenth section of article XIII of the consti-

tution of the State of California provides the same mode for the assessment of the franchises, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county, whether such property be owned by railroad or other quasi-public corporations, or by private corporations, or by natural persons, yet section four of article XIII of said constitution permits or allows indebtedness secured by mortgage, trust deed, or otherwise to be deducted from the value of such property only when it is owned by natural persons or corporations not quasi-public, and denies such deduction when the property is owned by railroad or other quasi-public corporations.

XXVI.

Section 10 of article XIII of said constitution of California provides that all property, except the franchise, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county in the State shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law.

The laws of said State prescribe that all property, except that above mentioned, shall be assessed in the county in which it is situated by an assessor elected by the people of such county.

Said assessors for each of said years have assessed to the owners and holders thereof in their respective counties the indebtedness of the defendant secured by the mortgage herein mentioned, but never have, nor does the law permit them so to do, made any deduction from the assessment of any of the property of this defendant, on account of the assessments made as aforesaid to the holders of such indebtedness.

XXVII.

Further discrimination.

All owners of railroad property, operated in more than one county, by virtue of said section ten of article XIII, are denied any protection from the laws of the State of California, which—

(*a.*) Require that property shall be taxed in proportion to its value.

(*b.*) Require such proportions to be ascertained by a general law.

(*c.*) Require that before liability be fixed an opportunity to be heard must be given.

(*d.*) Give an appeal from the assessor to boards of equalization.

(*e.*) Require the assessment to be made in the county, and prohibit its being made in localities distant from the *situs* of the property.

(*f.*) Which prescribe mode and manner of the assessment.

And defendant avers that at and before and ever since the adoption of the constitution of California, now in force, there were and are existing under the laws of said State corporations of various kinds, formed for the purpose of and actually operating and doing business and holding and using and operating property in more than one county in said State, and that at all of said times there

were and there now are divers natural persons, residents of said State, operating property in more than one county in said State, and that at all of said times there were and now are railroads owned by corporations formed under the general laws of said State, and also by natural persons, which are only operated in one county. That by the provisions of section ten of article XIII of said State constitution persons operating railroads in more than one county in the State have been singled out from all other persons operating property in more than one county and denied the right, common to all other persons to appeal for relief from over-valuations of their property by assessors to the local board of equalization, and denied the rights and privileges accorded by the laws to all other persons in that respect.

Corporations in said State of California now are and ever
42 have been formed under general laws relating thereto, and railroad and all other corporations, except public corporations formed or organized for the government of a portion of the State, now are and ever have been designated by the laws of California as private corporations. Under the provisions of the laws relating to the formation of private corporations such corporations may be formed for any purpose for which individuals or natural persons may lawfully associate themselves together; and there now exist in California, and ever have existed, corporations formed under said laws for fire, marine, mutual life, health and accident insurance; building, constructing, and operating railroads, wagon roads, telegraphs, bridges, ferries, wharves, chutes, and piers, and for constructing and operating canals, for the purposes of acquiring lands in large tracts and distributing them as homesteads among the corporations, for savings and loans, for mining, for the sale and distribution of water in cities and towns, for manufacturing, mechanical, and agricultural purposes; for benevolent, charitable, and educational purposes; for cemeteries, agricultural fairs, and various other purposes.

In said State of California there now are, and for more than three years last past have been, various railroads owned, operated, and controlled either by individuals, partnerships, or by private corporations other than railroad corporations, to wit, by mining and manufacturing corporations. There now is, and for more than three years last past has been, a railroad in use and operation extending from the city of Marysville, in the county of Yuba, to the town of Oroville, in the county of Butte, in said State, a distance of twenty-seven miles, which said road now is, and ever has been, operated in more than one county in this State, and is of the same gauge as the road of this defendant, and has ever been operated for like uses and purposes.

Said road, with all its equipments, now is, and for more than three years last past has been, in the ownership and under the operation and control of one N. D. Rideout, a citizen of the United States, and resident of the State of California.

There now is, and for more than three years last past has been, a railroad extending from the town of Santa Cruz, on the Pacific Ocean, and in the county of Santa Cruz, eastward through said

county and into the county of Monterey to the town of Pajaro, a distance of about twenty-one miles. Said road now is, and for a long time past has been, owned, operated, and used for like purposes for which the defendant's road is owned, operated, and used, and that the same now is, and for a long time past has been, in the ownership and operated by the Pacific Improvement Company, a private corporation formed under the laws of the State of California, which said corporation is not, and never has been, a railroad or quasi-public corporation.

There now are, and for more than five years last past have been, divers other railroads owned and operated in said State by corporations other than railroad corporations, and by individuals and partnerships; and that all of said corporations, individuals, and partnerships are the owners of lands which are assessed by the local assessors of the various counties in which such lands are situated, and all are entitled under the laws of said State to the deductions provided for in said laws, and, as said defendant, upon information and belief, avers, have been allowed such deductions.

XXVIII.

System adopted by said board violates rules of equity.

The State Board of Equalization, in making said pretended assessment of the said roadway of defendant, did willfully and designedly include in the valuation of said roadway the value of fences erected upon the land of coterminous proprietors, and did willfully and designedly value the said roadway at a greater value than the value of other property similarly situated, and greater than its actual value, upon the ground that such increased valuation should be made because the title of defendant thereto was acquired by condemnation.

The value of such fences, which were not the property of defendant nor the property of the owners of said roadway, and the increased value affixed to the roadway by the system adopted by the board, are blended in said pretended assessment, and there is no mode or means by which such illegal valuation can be separated from those which may be legal.

43

XXIX.

Defendant's franchise a Federal one.

And defendant, upon its information and belief, avers that under and by virtue of the said several acts of Congress, defendant became, and ever since has been, a Federal corporation and has held its franchise and exercised all its corporate powers under the Government of the United States.

XXX.

Corporate powers in part derived from acts of Congress.

And defendant, upon its information and belief, avers that if by virtue of the several acts of Congress herein referred to it did not

become a Federal corporation, yet it holds under the Government of the United States all the corporate powers and franchises granted to it by the said several acts of Congress as the trustee of the said Government, and for the governmental uses and purposes specified in said acts.

XXXI.

That the franchise of defendant is not subject to State taxation.

Under and by virtue of the said several acts of Congress hereinbefore referred to the defendant was by the Government of the United States selected as the means and instrument of that Government to construct the railroad hereinbefore described, and to keep and maintain the same in repair, to the end that the said Government might, when occasion required, use the same for the transportation of its armies and military stores, and for such other purposes as said Government might, in the execution of its powers, desire to use the same. The Government of the United States has never given to the State of California the right to lay any tax upon the franchise, existence, or operations of defendant. Such a tax would hinder and impede the lawful operations of the Government of the United States; would hinder, delay, and prevent the defendant from performing, as aforesaid, its obligations to the United States, and would nullify and prevent the enforcement of the said several acts of Congress.

44 XXXII.

Whole franchise assessed.

Said pretended assessment made by the State Board of Equalization is upon all of the franchises of defendant, and the said board, in valuing the same, included the value of all the franchises and corporate powers held and exercised by defendant under said acts of Congress.

XXXIII.

Tax upon the franchises blended with tax upon other property.

The State Board of Equalization, in making said pretended assessment, included and assessed the franchise of defendant, and in making said pretended apportionment included in the valuation affixed to the property of defendant the value thereof, but such value is not separately stated in said apportionment, nor upon any assessment roll or delinquent list of said county, but such value is in said pretended apportionment and upon the assessment roll and delinqent list of said county, blended with the values affixed to the roadway, road-bed, etc., and cannot on either be distinguished or separated from such other values, and the tax upon said franchise is in like manner blended with and cannot be separated from the tax on said roadway, road-bed, etc.

XXXVIII.

Plaintiff's causes of action based upon assessment by State Board of Equalization.

On the 2d day of May, 1880, the State Board of Equalization of the State of California, pretending to act under and by virtue
45 of the powers conferred upon it by section ten of Article XIII of the constitution of the State of California, did make a pretended assessment for the purposes of taxation for the fiscal year of said State then next coming, upon the franchise, roadway, road-bed, rails, and rolling-stock of the railroad hereinbefore described and known as the Southern Pacific railroad, against this defendant; that said pretended assessment was made separately upon the franchise, roadway, road-bed, rails, and rolling-stock of said railroad, and was then and there so entered upon the minutes of said board. Said pretended assessment is the assessment upon which the several taxes mentioned in plaintiff's complaint are claimed to be due, and that no other assessment than such pretended assessment was ever made against or upon said property or any part thereof.

Wherefore defendant prays it be hence dismissed, with costs.

P. D. WIGGINTON AND
McALLISTER & BERGIN,
Attorneys for Defendant.

S. W. SANDERSON AND
CREED HAYMOND, *Of Counsel.*

46 *Verification.*

STATE OF CALIFORNIA, }
City and County of San Francisco, } *ss:*

J. L. Willcutt, being first duly sworn, on oath, says: That he is an officer, to wit, the secretary of the corporation defendant herein; that he has read the foregoing amended answer, and knows the contents therof; that the same is true of his own knowledge, except as to those matters therein stated on his informatlon or belief, and as to those he believes it to be true.

J. L. WILLCUTT.

Subscribed and sworn to before me, this 21st day of May, A. D. 1883.

[SEAL.] CHARLES J. TORBERT,
Notary Public in and for the City and County of San Francisco, State of California.

47 "EXHIBIT A."

This indenture, made and entered into this the first day of April, A. D. 1875, by and between the Southern Pacific Railroad Company, a railroad corporation duly incorporated and organized under and in pursuance of the laws of the State of California, party of the first

part, and D. O. Mills and Lloyd Tevis, of the city and county of San Francisco, California, parties of the second part, witnesseth: That

Whereas the said party of the first part desires to complete the construction and equipment of its railroad and telegraph lines in the State of California, running from the city of San Francisco in a southerly and southeasterly direction, by way of Carnadero Junction, Salinas Valley, and Polonio Pass, to the Colorado river, at or near the "Needles;" also from Carnadero Junction to San Benito; also from Los Gatos creek, via Goshen, to the junction with the first-mentioned line between Poso creek and Kern river; also from the junction near Tehachapi Pass, via Los Angeles to the Texas Pacific railroad, near Port Yuma; and also from Los Angeles to Wilmington, on San Pedro bay, aggregating eleven hundred and fifty miles of railroad and telegraph line, and to cancel its present bonded indebtedness for construction, secured by a mortgage heretofore made, and bearing date November first, eighteen hundred and seventy, and to that end intends and is about to issue its first mortgage bonds upon said railroad and telegraph line, and its rolling stock, fixtures, and franchises, and also upon the lands granted to it by Congress by the act of Congress, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," approved July twenty-seventh, eighteen hundred and sixty-six, and the act entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," approved March third, eighteen hundred and seventy-one, not sold or otherwise disposed of prior to the execution of this mortgage, aggregating, as near as can be estimated, eleven millions of acres; And

Whereas, heretofore, to wit, on the nineteenth day of December, A. D. eighteen hundred and seventy-four, the board of directors of said company, pursuant to the statute of the State of California in such cases made and provided, at a meeting of said board, at which all the members thereof were present, did, by a resolution to that effect, which was unanimously adopted and passed, determine and direct that first mortgage bonds upon said railroad and telegraph line, its rolling stock, fixtures, and franchises, and upon said hereinbefore described lands, to the number of forty-eight thousand (forty-four thousand of which shall be for one thousand dollars each, and four thousand of which shall be for the sum of five hundred dollars each), in seven series, to be designated by the letters of the alphabet, commencing with the letter "A," and followed by the succeeding letters in regular order to the letter "G," both inclusive, be prepared, executed, and issued by the president and secretary of said company. Series "A" to consist of thirteen thousand bonds for one thousand dollars each, numbered from one to thirteen thousand, both inclusive, and four thousand bonds for five hundred dollars each, numbered from thirteen thousand and one to seventeen thousand, both inclusive. Series "B" to "F," both inclusive, consisting each of five thousand bonds, for one thousand dollars each, numbered from seventeen thousand and one to forty-two thousand, both inclusive, and Series "G," consisting of six thousand bonds for one thousand dol-

lars each, numbered from forty-two thousand and one to forty-eight thousand, both inclusive. All of said bonds being payable thirty years after date, with interest at the rate of six per centum per annum, payable semi-annually. The said Series "A" to bear date April first, eighteen hundred and seventy-five, and the said several succeeding series to bear such dates respectively as the board of directors of said company may direct; all of said bonds aggregating the sum of forty-six millions of dollars; And

Whereas the said board of directors, at the meeting aforesaid, and in the manner and form, and by the vote aforesaid, did further resolve that the said Series "A" of said bonds should be executed aud issued in substantially the following form, and that the succeeding series of said bonds should be in a similar form, with the necessary changes to conform to said resolutions or orders, which form is as follows, to wit:

THE UNITED STATES OF AMERICA.

In United States gold coin, $1,000. In United States gold coin, $1,000

(VIGNETTE.)

First Mortgage Bond.

No. —. Series "A."

The Southern Pacific Railroad Company (of California),

for value received, promises to pay one thousand dollars to Mark Hopkins, or bearer, in the city of New York, thirty years from the date hereof, with interest thereon at the rate of six per centum per annum from said date, payable semi-annually on the first day of October next ensuing, and on the first day of April and October in each year thereafter, in the city of New York, on presentation and surrender of the respective coupons hereunto annexed, both principal and interest payable in United States gold coin at par, dollar for dollar.

48 This bond is one of Series "A" of the first mortgage bonds issued and to be issued by the said Southern Pacific Railroad Company in seven series designated respectively by the letters of the alphabet, commencing with "A" and ending with "G," both inclusive. Series "A" consisting of thirteen thousand bonds for one thousand dollars each, numbered from one to thirteen thousand, both inclusive, and four thousand bonds for five hundred dollars each, numbered from thirteen thousand and one to seventeen thousand, both inclusive. Series "B" to "F," both inclusive, consisting each of five thousand bonds for one thousand dollars each, numbered from seventeen thousand and one to forty-two thousand, both inclusive, and Series "G," consisting of six thousand bonds for one thousand dollars each, numbered from forty-two thousand and one to forty-eight thousand, both inclusive. All of said bonds being payable thirty years after their respective date, with the interest at the rate of six per centum per annum, payable semi-annually.

The said Series "A" to bear date April first, eighteen hundred and seventy-five, and the said several succeeding series to bear such dates

respectively as the board of directors of said company may direct; all of said bonds aggregating the sum of forty-six millions of dollars.

The holder of any such bonds is to have no preference over any other holder of any of said bonds by reason of any priority in date or the time of issuing the same or otherwise.

All of said bonds are secured by a mortgage or deed of trust bearing even date with the bonds constituting Series "A," duly executed by said company to D. O. Mills and Lloyd Tevis, San Francisco, California, as trustees, upon its railroad and telegraph lines in the State of California, running from the city of San Francisco in a southerly and southeasterly direction by way of Carnadero Junction, Salinas Valley and Polonio Pass to the Colorado river at or near the "Needles;" also, from Carnadero Junction to San Benito; also, from Los Gatos creek via Goshen to the junction with the first mentioned line between Posa creek and Kern river; also from the junction near Tehachapi Pass via Los Angeles, to the Pacific railroad near Fort Yuma, and also from Los Angeles to Wilmington on San Pedro bay, aggregating eleven hundred and fifty miles of railroad and telegraph line, with all the rolling stock, stations, fixtures, and franchises for the permanent use thereof, and the appurtenances thereto now owned or held, or that may be hereafter required by said company for the permanent use of said railroad and telegraph lines.

Also upon all the lands granted to said company by the Congress of the United States to aid it in the construction of said railroad and telegraph lines, not sold or otherwise disposed of prior to the execution of said mortgage, aggregating, as near as can be estimated, eleven millions of acres.

In testimony whereof, the Southern Pacific Railroad Company has caused its corporate seal to be hereunto affixed, and these presents to be signed by its president and secretary, this first day of April, in the year of our Lord one thousand eight hundred and seventy-five.

——— ———, *President.*
——— ———, *Secretary.*

And whereas, the said board of directors, at the meeting aforesaid and in the manner and form, and by the vote aforesaid, did further direct that to each of said bonds there should be attached sixty interest coupons, numbered respectively from one to sixty inclusive, substantially in the following form, to wit:

$30. SOUTHERN PACIFIC RAILROAD COMPANY OF CALIFORNIA. Series A.

Coupon. Bond No. —. No. —.

Thirty Dollars.

Interest due —— ——.

Payable in the City of New York in United States gold coin.

——— ———, *Secretary.*

with such changes in amount in the body and in the coupon as shall

be necesary to conform to the order of the board of directors aforesaid, in regard to the several amounts or sums which are payable in each class of bonds; And

Whereas, by an act of Congress of the United States of America, approved on the twenty-seventh day of July, A. D. eighteen hundred and sixty-six, entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," there was granted to the said Southern Pacific Railroad Company, party of the first part, a large body of public lands of the United States, to wit: Every alternate section of public lands, designated by odd numbers, to the amount of ten alternate sections per mile on each side of the railroad and telegraph line of said company running from the bay of San Francisco to the southeasterly line of the State of California, being about six hundred and thirty-six miles, not sold, reserved, granted, or otherwise appropriated, and free from pre-emption, homestead, or other claims or rights at the time the line of said road is designated by a plat thereof, filed in the office of the Commissioner of the General Land Office, and such other alternate
49 sections designated by odd numbers as aforesaid, and situated not more than ten miles beyond the limits of the said first alternate sections, which may be selected by said company in lieu of any of the sections first aforesaid which may have been sold, granted, reserved, pre-empted, occupied as homesteads, or otherwise disposed of, or to which other rights may have attached, as provided in the act of Congress aforesaid for the purpose of aiding in the construction of the railroad and telegraph line of the said party of the first part; And

Whereas by an act of Congress of the United States of America, approved on the third day of March, eighteen hundred and seventy-one, entitled "An act to incorporate the Texas Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," there was granted to the said Southern Pacific Railroad Company the authority to construct a line of railroad from a point near Tehachapi Pass, by way of Los Angeles, to the Texas Pacific railroad, at or near the Colorado river, with the same rights, land grants, and privileges and subject to the same limitations, restrictions, and conditions as were granted to and imposed upon the said Southern Pacific Railroad Company of California by the aforesaid act of July twenty-seventh, eighteen hundred and sixty-six, before recited, subject to the rights, present and prospective, of the Atlantic and Pacific Railroad Company, which said last line of road is of the length of three hundred and fifty-six and seven one-hundredths miles; and

Whereas the said board of directors, at the meeting aforesaid, and in the manner and form and by the vote aforesaid, did further direct that, to secure the payment of said bonds, a first mortgage upon said road and its rolling-stock, stations, fixtures, right of way, and franchises, and the lands aforesaid granted by said acts of Congress not sold or otherwise disposed of or contracted to be sold, as shown by the books of said company, should be executed under the corporate seal of said company, and be signed by its president and secre-

tary, to D. O. Mills and Lloyd Tevis, both of the city and county of San Francisco, State of California, as trustees for the holders of said bonds; and

Whereas said board of directors, at the meeting aforesaid, and in the manner and form and by the vote aforesaid, did further direct that a sinking fund should be created for the redemption and payment of said bonds, by setting apart the sum of one hundred thousand dollars of the net income of said road in the year eighteen hundred and eighty-two, and each year thereafter, until all of said bonds, principal and interest, shall have been redeemed or paid, in trust, to be loaned out at interest, upon good securities, or otherwise invested under the order and direction of said board of directors, or used to redeem said bonds as often as one hundred thousand dollars shall come into the sinking fund, in which case notice shall be published, in one paper in the city of San Francisco and two papers in New York city, that bonds will be redeemed at a price not exceeding their par value, and inviting bids for the surrender thereof at prices to be named, not exceeding the par value of said bonds; the lowest bids less than par to be accepted, and bonds redeemed to the extent of the money in the sinking fund:

Now, therefore, this indenture witnesseth: that the said Southern Pacific Railroad Company, for the better securing of the payment of the principal and interest of the said first mortgage bonds, and in consideration also of the sum of one dollar, to it in hand paid by the said parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, and aliened, conveyed, and confirmed, and by these presents doth grant, bargain, sell, alien, convey, and confirm, unto the said parties of the second part, and to their successors duly appointed, for the execution of the trusts herein set forth, the following property now or hereafter constituted, purchased, acquired, held in possession, and owned by said company, to wit: The whole of the railroad and telegraph line of the said company, running from the city of San Francisco, in the State of California, in a southerly and southeasterly direction, by way of Carnadero Junction, Salinas Valley, and Polonio Pass, to the Colorado river, at or near the "Needles;" also, from Canadero Junction to San Benito; also, from Los Gatos creek, via Goshen, to the junction with the first-mentioned line, between Poso creek and Kern river; also, from the junction near Tehachapi Pass, via Los Angeles, to the Texas Pacific railroad near Fort Yuma, and also from Los Angeles to Wilmington, on San Pedro bay, aggregating eleven hundred and fifty miles of railroad and telegraph lines, including all the rights of way, roadway, track and tracks, together with all the superstructures, depots, depot grounds, station houses, watering places, workshops, machine shops, machinery, side tracks, turn-outs, turn-tables, weighing scales, locomotives, tenders, cars, rolling-stock of all kinds, full equipments, fixtures, tools, and all other property which may be necessarily or ordinarily used in operating or repairing the said railroad, including all of the said property which is now or may hereafter, in whole or in part, be constructed or completed, purchased, acquired, held, or owned by the said company pertaining to said railroad, and all the

corporate rights, privileges, and franchises of said company pertaining to said road, together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging and appertaining, and the reversion and reversions, remainder and remainders, rents, incomes, issues, and profits thereof, with all the rights, titles, interests, estate, property, succession, claim, and demand, in law or equity, of the said party of the first part of, in, and to the same, or any part and parcel thereof; to have and to hold the above granted and described premises, property, and franchises, with the appurtenances, unto the said parties of the second part, and to the survivor of them, and to their successors, duly appointed, upon trust and for the use and benefit of the person or persons, body or bodies politic or corporate, who shall have become, or be from time to time, holders of the said "first mortgage bonds," or any of them. Provided, always, and these presents are upon the express condition, that if the said party of the first part, or its successors, shall well and truly pay or cause or procure to be paid unto the holders, from time to time, of said bonds, and each and every one of them, the said sums of money secured to be paid by the said bonds, and the interest coupons attached thereto, at the places and times and in the manner set forth in the said bonds, according to the true intent and meaning thereof, then these presents, and all the property, estate, right, franchises, and privileges herein and hereby granted and conveyed, shall cease, termine, and be void. But if default shall be made in the payment of the said sums of money specified in said bonds, or in the payment of said interest coupons, or either of them, or any part thereof, and if the same shall remain unpaid for the period of six months from and after the time when the same should have been paid, according to the terms of said bonds, then the said parties of the second part, or either of them, upon the refusal of the other or their successors in said trust, by themselves or their agents or servants in that behalf, may upon request of the holder or holders of not less than one-fourth of said bonds on which the interest or principal shall so be and have so remained in default, as aforesaid, enter into and upon and take possession of all or in their or his discretion any part of the said premises and property hereinbefore described, and work and operate the said railroad and receive the income, receipts, and profits thereof, and out of the same pay, first, the expense of running and operating the same, including therein such reasonable compensation as they or he may allow to the several persons employed or engaged in the running and superintendence of the same, and a reasonable compensation to the parties of the second part or their successors or such of them as shall act in the premises; for their or his care, diligence, and responsibility in the premises. second, the expenses of keeping the said road, the appurtenances, the locomotives, and the rolling-stock thereof, in good and sufficient repair, to prevent deterioration in the value thereof, and all other reasonable and proper charges and expenses of the care and management thereof; and, third, pay, as far as the same will suffice, all interest and principal, if any, which may be due on said bonds. And in case of any deficiency to apply said receipts, after the payment

of all said charges and expenses, to the payment thereof ratably, without preference of any kind, or the said parties of the second part may in such case foreclose this mortgage and sell and dispose of according to law all the rights, property, privileges, franchises, real and personal, with the appurtenances herein and hereby granted, or so much thereof as may be necessary, and out of the money arising from such sale pay, first, the costs and charges and expenses of the foreclosure and sale, including therein reasonable counsel fees for conducting said proceedings, to be allowed and fixed by the court, but not exceeding thirty thousand dollars; second, any expenses, costs, and charges of the execution of the trust previously incurred and remaining unpaid; third, a reasonable compensation to the trustees or one of them who may act, for their or his care, trouble, and service in completing the execution of his trust and the distribution of the proceeds of sale, to be fixed by the court, but not exceeding twenty thousand dollars; and, fourth, to distribute the residue of said proceeds among the holders of said bonds in proportion to their several interests until all have been paid in full, principal and accrued interests.

And the said party of the first part hereby covenants and agrees that if at any time any lands now used for depot or shop purposes or right of way or water or any lands not now used, but which may be hereafter used for such purposes, shall, for any cause, cease to be needed or used by said party of the first part for such purposes, the said parties of the second part may sell the same at the price to be agreed upon by the parties of the first and second parts, and apply the money realized from such sale or sales to the redemption of said bonds in the manner hereinafter provided in the case of money realized from the sale of lands granted by the United States to the said party of the first part.

And the said party of the first part hereby agrees and covenants to and with the said parties of the second part and their successors in said trust that it will pay all ordinary and extraordinary taxes, assessments, and other public burdens and charges which shall or may be imposed upon the property herein described and hereby mortgaged, and every part thereof, and the said parties of the second part, the survivor of them, or their successors in said trust, or any one or more of the holders of said bonds, may in case of default of the said party of the first part in this behalf pay and discharge the same, and any other lien or incumbrance upon said property which may in any way, either in law or equity, be or become in effect a charge or lien thereon prior to these presents or to which this mortgage may be subject or subordinate, and for all payments thus made the parties so making the same shall be allowed interest thereon at the rate of seven per centum per annum, and such payments, with the interest thereon, shall be and are hereby secured to them by these presents, and declared to be payable and collectible in the same sort of currency or money wherein they shall have been paid, and the same shall be payable by said party of the first part to said parties of the second part upon demand, in trust for the party or parties

paying the same, and may be paid out of the proceeds of the sale of said property and franchises hereinbefore provided.

And the said party of the first part hereby further covenants and agrees to and with the said parties of the second part and their successors in said trust that they will at any and all times hereafter, upon the request of the said parties of the second part, execute, acknowledge, and deliver to the said parties of the second part all and every such further, necessary, and reasonable conveyances and assurances of the said premises or any part thereof as may by the parties of the second part, or the survivor of them, or his or their successors in the trust hereby created, be reasonably advised or required for more fully carrying into effect the objects of this conveyance, and the said parties of the second part and their successors in said trust shall be entitled to receive a just and proper compensation for all services rendered by them in the discharge of said trust, and the same shall be deemed to be secured hereby.

And it is hereby stipulated and agreed that the said parties of the second part and their successors in said trust shall not be responsible for the acts or omissions of any agent or agents employed by him or them, in any manner, in and about the execution of the trust hereby created, when such agent or agents are selected with reasonable discretion, or with the approbation or with the knowledge and without the express disapprobation of said party of the first part, nor shall either of the said parties of the second part be responsible for any act or omission of the other in the execution of said trust.

And, therefore, this indenture further witnesseth, that the said party of the first part, for the purpose of securing the payment of the sums of money mentioned in said bonds and the interest thereon, and in consideration of the premises, and also for and in consideration of the sum of one dollar, to the said party of the first part in hand paid by the parties of the second part, the receipt whereof is hereby acknowledged, has granted, bargained, sold, released, enfeoffed, conveyed, and confirmed, and by these presents does grant, bargain, sell, release, enfeoff, convey, and confirm, unto the said parties of the second part, as trustees, and to their successors and survivor, and their assigns, forever—

All and singular the said several sections of land so as aforesaid granted by said acts of Congress; and also all the estate, right, title, interest, claim, and demand whatsoever, at law or in equity, of, in, or to the same, or any part or parcel thereof, which the said
51 party of the first part now has, holds, owns, or is entitled to, or hereafter may or shall acquire, have, hold, own, or be or become entitled to, by force or virtue of the said acts of Congress; saving, excepting, and reserving all parts and parcels of said lands which have been sold or contracted to be sold or disposed of heretofore, or which are or shall be included in the right of way of the said railroads and telegraph lines of the said company, as defined and granted by the acts of Congress aforesaid, or used for the construction or operation thereof, or for the track, yards, depot grounds, buildings, or erections thereof.

To have and to hold all and singular the lands hereby granted or

intended to be granted, and each and every part and parcel thereof, with the appurtenances thereunto belonging, unto the said parties of the second part, and their successors and survivor, and their assigns, forever, as trustees, for the uses and purposes, and upon the trusts, terms, conditions, and agreements in this indenture set forth and declared.

Provided always, and these presents are upon the express condition, that if the said party of the first part shall well and truly pay, or cause to be paid, to the holders of said bonds, and every of them, the principal sums of money therein mentioned, according to the tenor thereof, with interest thereon, at the times and in the manner hereinbefore provided, according to the true intent and meaning of these presents, then and from thenceforth this indenture, and the estate hereby granted, shall cease and determine, and all the right, title, and interest in any and all property hereby conveyed to the parties of the second part not then disposed of under the powers hereby conferred shall revert to and vest in the said party of the first part.

This indenture further witnesseth that these presents and the said bonds are made, executed, and delivered upon the trusts, terms, conditions, and agreements following, that is to say: That all the lands hereinabove conveyed and mortgaged shall be under the sole and exclusive management and control of the said party of the first part, who shall have full power and authority to make contracts for the sale of the same at such price, on such credit or terms of payment, and such other conditions as shall be agreed on by the said parties of the first and second parts, and as shall seem to them best calculated to secure the payment in full of all the bonds issued, as hereinbefore provided, until entry or foreclosure by the trustees, as hereinafter provided; but no title to any tract of land, contracted to be sold by the said party of the first part, shall be given until the whole of the purchase-money of said tract shall be paid to said parties of the second part, or their successors or survivor, in cash or in said bonds, or overdue coupons thereof. And for this purpose it is agreed that the said party of the first part and said trustees shall cause all such lands, as they shall from time to time become subject to sale, to be carefully examined and surveyed, and shall affix to each tract or parcel such price as in their judgment shall be most judicious, having in view the interests of all parties; and said lands shall be and remain at all times thereafter open for sale to any person who may desire to purchase and pay therefor; the prices being, nevertheless, at all times subject to revision and alteration by the said parties; and the party of the first part may reserve from sale any lands necessary for depot grounds, or other purposes connected with the construction or operation of the said railroad or telegraph.

The purchaser of any such land shall be at liberty to pay for the same in the aforesaid bonds or overdue coupons at par; and when any tract or parcel of said lands shall have been purchased and paid for, either in bonds, coupons, or cash, as hereinbefore provided, the same shall be conveyed by the said parties of the first and second parts to the purchaser, in fee simple, and shall by such conveyance

be absolutely and forever released from any and all lien or incumbrance, for or on account of said bonds, or any other debt or obligation of the said party of the first part.

Provided, That for the sake of convenience in making said conveyances the said trustees shall have power to act by attorney, duly nominated and appointed by them, jointly, by letter of attorney, which shall be duly acknowledged and recorded in each and all of the counties in which said lands, or any part thereof, are situated; and all deeds made in their names by such attorney shall have the same force and effect as if made by them in person.

Provided, further, That the attorney so appointed shall be a resident of the city of San Francisco, in the State of California, and shall reside within convenient reach of the party of the first part.

The said trustees shall and will cancel and discharge each and every bond and the coupons thereon, and all overdue coupons, which they may receive in payment for land, or by purchase, by defacing the seal of the corporation, perforating the signature of the president and secretary, and drawing lines across each of the interest coupons, on receipt thereof, and all bonds and coupons received in payment for lands as aforesaid shall, when so cancelled, be delivered to the said party of the first part.

The said trustees shall apply the proceeds of the sales made by them of lands hereby conveyed to the sole and exclusive purpose of the payment of the bonds provided for in, and issued in conformity to, the terms of this indenture.

And for such purpose all such avails shall, from time to time, as the same are realized, be used in the purchase of such bonds in the market, to be cancelled, so long as purchases thereof can be made at par; and whenever such bonds cannot be purchased at that rate said trustees shall advertise for proposals to sell such bonds to them in two newspapers published in the city of New York, and one newspaper published in the city of San Francisco; and after receiving such proposals they shall have power to purchase such bonds at the lowest terms so offered.

The said party of the first part does hereby covenant and agree to pay to the holders of said bonds, respectively, the said principal sums of money therein mentioned, and the interest thereof, as aforesaid.

If any default shall be made in the payment, either of principal or interest on any of said bonds for six months after demand at the place of payment when the same shall become due, then the said trustees may, on being requested by the holders of at least one hundred thousand dollars of such bonds, enter into and take possession of any of the lands above conveyed and foreclose this mort-
52 gage, and may sell at public auction so much of said lands as may be necessary to discharge all arrears of such interest, and apply the proceeds, after deducting the costs, charges, and expenses of such entry, foreclosure and sale, to the payment of such arrears of interest. If any such default shall continue for one year from the time of such demand and refusal the principal sum of all bonds then outstanding shall become due and payable, and the said trustees may enter into and take possession of all the lands above by

these presents mortgaged or conveyed, foreclose this mortgage, and sell at public auction all said lands, or so much thereof, as may be necessary, first giving at least six months previous notice of the time and place of sale in at least one newspaper published in the city of New York, and in one published in each of the cities of San Francisco, Sacramento, Los Angeles, and San Diego, and they shall apply the proceeds thereof, after deducting the costs, charges, and expenses of such last-mentioned entry, foreclosure, and sale to the payment of all said bonds then outstanding, and the interest accrued thereon, rendering the surplus, if any there shall be, unto the said party of the first part. In case of any sale upon any such foreclosure, or at any such public auction, the said trustees shall make, execute, and deliver a conveyance of the said lands so sold, which shall convey to the purchasers all the rights and privileges of the said party of the first part in and to the property so sold to the same extent as the same shall have been previously enjoyed and held by the said party of the first part.

If after any such entry shall be made, or any such foreclosure proceedings shall be commenced for the satisfying of interest only, as above provided, and before the lands are sold thereon, the said party of the first part shall pay and discharge such interest and deliver the coupons therefor to the said trustees, and pay all the costs, charges, and expenses incurred in such entry and foreclosure and the proceedings thereon; then and in every such case the said trustees shall discontinue their proceedings thereon, and restore to the said party of the first part all of such lands to be held subject to the above conveyance and mortgage, and subject to all the provisions, terms, and conditions of these presents, in like manner as if such entry had not been made nor such foreclosure proceedings commenced. In case a vacancy shall happen in the number of trustees hereinbefore mentioned as parties of the second part in this indenture, or if one of them shall be temporarily absent, the remaining trustee shall, while said vacancy or absence exists, have all the rights, exercise all the powers, and discharge all the duties devolving on the said trustee by said instrument. But as soon as it conveniently may be done, such vacancy shall be filled by the nomination by the remaining trustee of some proper person to fill such vacancy, which nomination shall be submitted to the board of directors of said company, and, if approved by them, the person so nominated and approved immediately shall become a trustee under this instrument. If said nomination is not approved, another person shall be nominated by said remaining trustee, and in like manner submitted for approval, and so on till three nominations shall have been made. But if three successive nominations shall be made and none of them shall be approved by said board, said vacancy shall be filled by a committee of three persons, selected, one by said remaining trustee, one by said board of directors, and a third by the two thus selected, and the person appointed trustee by a majority of the committee shall be and remain a trustee under this instrument. And the person regularly appointed a trustee to fill a vacancy in either of the forms above specified shall, from and after his said appointment, and

his acceptance of the appointment, become vested with the same estates, powers, rights, and interests, and charged with the same duties and responsibilities as if he had been one of the original trustees, parties of the second part, named in and executing this instrument, and the prior remaining trustee may and shall execute such conveyances and instruments as may be proper or necessary to vest the same in such new trustee jointly with him, or to furnish evidence of such vesting. If at any time either of the said trustees shall resign his place as trustee by a proper deed in writing to that effect, and such resignation shall be accepted by the said party of the first part, then, and in every such case, the place of such resigning trustee thereupon shall become and be vacant.

Whenever all the bonds which shall have been made and issued by the said party of the first part under and in conformity to the provisions of this indenture, with the interest thereon, together with all the expenses incurred by the said trustees in the execution of the trust herein and hereby created shall have been fully paid or satisfied, the said trustees shall reconvey to the said party of the first part all and singular the said lands then in the hands of the said trustees, and not before that time sold or disposed of, in the execution of the trust hereby created. In case the said trustees shall at any time have any trust moneys on hand received from the sale of the lands hereby conveyed which will not be required to meet any immediate liabilities of the company, to which said moneys are by these presents devoted, the said moneys shall be loaned on interest, or deposited on interest, with some bank or trust company in the city of San Francisco or Sacramento, subject to be drawn by checks signed by the trustees, or such one of them, as they may designate. All of the books of the said company, and of the trustees, relating to the lands hereby conveyed, shall be mutually open to the inspection of said company and said trustees, It shall be the duty of the said trustees to certify and deliver to the said party of the first part the said bonds, as the same from time to time shall be demanded, issued, or used by the said party of the first part.

And it ts hereby mutually agreed by and between the parties hereto that the said parties of the second part, and their survivor and successors, and their heirs, executors, and administrators, shall not be answerable for the acts, omissions, or defaults of each other, nor for anything short of their own gross negligence or wilful misfeasance.

It is hereby declared by the parties to this indenture that all the provisions of said acts of Congress, so far as they are applicable, are hereby made and shall be deemed and taken to be a part of this instrument; and the said provisions in all that concerns the sale and disposal of the said lands hereby conveyed to the parties of the second part are to be observed and strictly and faithfully carried out and fulfilled.

And the said party of the first part covenants and agrees to and with the said parties of the second part, that the said party of the first part shall and will at any and all times hereafter, and from time to time execute, acknowledge, and deliver, under its corporate

seal, to the said parties of the second part, and their survivors or successors, all such other or further assurances, deeds, mortgages, obligations, transfers, indentures, and instruments in writing, and shall and will do and perform all such other or further acts or things as shall or may be necessary or proper, or as their counsel, learned in law, shall deem necessary, proper, or expedient for the better or more effectually securing upon the above conveyed and mort-
53 gaged premises the payment of the said bonds so to be issued, and the interest due and to grow due thereon in manner aforesaid, or for carrying into effect the true intent, design, objects, and purposes of these presents. And the said parties of the second part hereby accept the trust created and declared by this instrument, and agree to discharge the same pursuant to the provisions in that behalf herein contained.

In witness whereof the said Southern Pacific Railroad Company has caused these presents to be signed by its president and secretary, and sealed with its corporate seal, and the above parties of the second part have hereunto set their hands and seal, the day and year first above written.

CHARLES CROCKER,
President Southern Pacific Railroad Company.
[SEAL.] J. L. WILLCUTT,
Secretary Southern Pacific Railroad Company.

We accept the trust declared in the foregoing instrument.

D. O. MILLS, [SEAL.]
LLOYD TEVIS, [SEAL.]
Trustees.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss:

On this third (3rd) day of July, in the year one thousand eight hundred and seventy-five (1875), before me, Charles J. Torbert, a notary public in and for the said city and county of San Francisco, State of California, duly commissioned and qualified, personally appeared Charles Crocker, known to me to be the president of the Southern Pacific Railroad Company, and J. L. Willcutt, known to me to be the secretary of the Southern Pacific Railroad Company, the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, this 3rd day of July, A. D. 1875.

[SEAL.] CHARLES J. TORBERT,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA,
City and County of San Francisco, } ss:

I, Charles J. Torbert, a notary public in and for the said city and county of San Francisco, State of California, residing in the city of San Francisco, duly commissioned and sworn, do certify that on the sixth (6th) day of July, in the year one thousand eight hundred and seventy-five (1875), personally appeared before me in the city

and county of San Francisco, State of California aforesaid, Charles Crocker, president of the "Southern Pacific Railroad Company," and J. L. Willcutt, secretary of the "Southern Pacific Railroad Company," who are both personally known to me to be the said officers of the said "Southern Pacific Railroad Company," respectively, and the individuals described in and who have executed the foregoing instrument as such officers of said company, and they each severally and personally, then and there, acknowledged to me that they executed the said instrument as the free act and deed of the said "Southern Pacific Railroad Company" freely and voluntarily, and for the uses and purposes therein mentioned; and the said J. L. Willcutt, with whom I am personally acquainted, being by me duly sworn, did depose and say that he resides in the city and county of San Francisco, State of California; that he is and was secretary of the "Southern Pacific Railroad Company" at the date and time he executed the foregoing instrument; that he knows the corporate seal of said company, and is, and was at the date of said instrument, the legal custodian of said seal; that the seal affixed to the foregoing instrument was and is such corporate seal, and was by him so affixed by order of the board of directors of the said "Southern Pacific Railroad Company;" that he signed his name thereto as secretary of said company by the like order. And the said J. L. Willcutt further said that he was and is acquainted with Charles Crocker, and knows that said Charles Crocker is and was president of the "Southern Pacific Railroad Company" at the date of said instrument; that the signature of the said Charles Crocker subscribed to said instrument is in the genuine handwriting of the said Charles Crocker, and was thereto by him subscribed by the like order of the board of directors of said company, and in the presence of him, the said deponent.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the city and county of San Francisco, State of California, the 6th day of July, A. D. 1875.

[SEAL.] CHARLES J. TORBERT,
Notary Public in and for the City and County of San Francisco, State of California.

STATE OF CALIFORNIA, }
City and County of San Francisco, } ss:

On this seventh (7th) day of July, in the year one thousand eight hundred and seventy-five (1875), before me, Charles J. Torbert, a notary public in and for the said city and county of San Francisco, State of California, duly commissioned and qualified, personally appeared D. O. Mills and Lloyd Tevis, known to me to be the persons whose names are subscribed to the within instrument, and acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal at my office in the city and county of San Francisco, State of California, this 7th day of July, A. D. 1875.

[SEAL.] CHARLES J. TORBERT,
Notary Public in and for the City and County of San Francisco, State of California.

54 Filed for record at the request of D. W. Parkhurst, and recorded in office of the county recorder of San Mateo county, July 8th, 1875, at 5 p. m., in Liber 11 of Mortgages, at page 2 and following.

Witness my hand and seal of office.

[SEAL.] Paid $22.50. GEO. H. RICE,
County Recorder,
By W. R. THOMAS, *Deputy.*

Filed for record at the request of D. W. Parkhurst, July 9th, A. D. 1875, at 9 o'clock and 26 minutes a. m., and recorded in Book 15 of Mortgages, at page 156 *et seq.*, records of the county of Santa Clara, in the State of California.

Witness my hand and seal of office.

[SEAL.] Paid $15. W. J. COLAHAN,
County Recorder,
By F. J. SAXE, *Dep't.*

Filed for record at the request of D. W. Parkhurst, July 9th, A. D. 1875, at 8 o'clock and 43 minutes p. m., and recorded in Book 1 of Mortgages, at page 586 and following, records of San Benito county, in the State of California.

Witness my hand and seal of office.

[SEAL.] Fees, $15, paid. H. M. HAYES,
Co. Recorder.

Filed for record at the request of D. W. Parkhurst, July 10th, A. D. 1875, at 8 o'clock and 10 minutes p. m., and recorded in volume 17, page 529, and following pages of the mortgage records of the county of Santa Cruz, in the State of California.

Witness my hand and seal of said county recorder.

[SEAL.] Paid $15.00. H. E. MAKENNEY,
County Recorder in and for Santa Cruz County.

Filed for record at the request of D. W. Parkhurst, July 12th, A. D. 1875, at 9 o'clock and 55 minutes a. m., and recorded in Book 1 of Mortgages, page 183 and following, records of the county of Monterey, in the State of California.

Witness my hand and seal of office.

[SEAL.] Fees, $15, p'd. HERBERT MILLS,
County Recorder.

Filed for record at the request of D. W. Parkhurst, July 13th, A. D. 1875, at six o'clock and 25 minutes p. m., and recorded in Book "C" of Mortgages, page 540 *et seq.*, records of the county of San Luis Obispo, in the State of California.

Witness my hand and seal of office county recorder.

[SEAL.] Fees, $15. CHAS. W. DANA,
County Recorder.

Filed for record at the request of D. W. Parkhurst, July 14th, A. D. 1875, at 2 o'clock and 20 minutes p. m., and recorded in Book

"F" of Mortgages, pages 164 and following, records of the county of Santa Barbara, in the State of California.

Witness my hand and seal of office of county recorder.

[SEAL.] Fees, $15, p'd. H. P. STONE,
County Recorder,
By J. O. B. WENTLING,
Deputy.

Filed for record at the request of D. W. Parkhurst, July 16th, A. D. 1875, at 8 o'clock and 40 minutes a. m., and recorded in Book 15 of Mortgages, page 600 *et seq.*, records of the county of Los Angeles, in the State of California.

Witness my hand and seal of office county recorder.

[SEAL.] Fees, $15, p'd. J. W. GILLETTE,
County Recorder,
By D. S. LOVEJOY,
Deputy.

Filed for record at the request of D. W. Parkhurst, July 19th, A. D. 1875, at nine o'clock and 15 minutes a. m. and recorded in Book Volume 2 of Mortgages, pages 217 and following, records of the county of Kern, in the State of California.

Witness my hand and seal of office.

[SEAL.] Fees, $15, p'd. F. W. CRAIG,
County Recorder.

55 Filed for record at the request of D. W. Parkhurst, Esq., July 20th, A. D. 1875, at 8 o'clock and 15 minutes p. m., and recorded in Book D of Mortgages, pp. 310 *et seq.*, records of the county of Fresno, in the State of California.

Witness my hand and seal of office of county recorder.

[SEAL.] P'd $15. A. M. CLARK, *County Recorder*,
By C. L. WAINWRIGHT, *Deputy*.

Filed for record at request of D. W. Parkhurst, July 21st, A. D. 1875, at 10 o'clock and 30 minutes a. m., and recorded in Book "K" of Mortgages, page 1 *et seq.*, records of the county of Tulare, in the State of California.

Witness my hand and seal of office of county recorder.

[SEAL.] P'd $15. J. E. DENNY, *Recorder*,
By JOHN G. KNOX, *Deputy*.

Filed for record at the request of D. W. Parkhurst, July 23d, A. D. 1875, at 10 o'clock and 40 minutes p. m., and recorded in Book "D" of Mortgages, 544 *et seq.*, records of the county of San Bernardino, in the State of California.

Witness my hand and seal of office of county recorder.

[SEAL.] P'd $15.00. SYDNEY P. WAITE,
County Recorder,
By R. S. SWING, *Deputy*.

Filed for record at the request of D. W. Parkhurst, July 26th, A. D. 1875, at 10 o'clock and 20 minutes a. m., and recorded in Book

No. 7 of Mortgages, pages 103 *et seq.*, records of the county of San Diego, in the State of California.

Witness my hand and seal of office of county recorder.

[SEAL.] Fees, $15. A. S. GRANT,
County Recorder,
By E. G. HAIGHT, *Deputy.*

Filed for record at the request of D. W. Parkhurst, July 28th, A. D. 1875, at 24 minutes past 4 p. m., and recorded in Book No. 2 of Mortgages, pages 46 *et seq.*, records of the county of Ventura, State of California.

Witness my hand and seal of office of county recorder.

[SEAL.] Fees, $18. JOHN T. STOW,
County Recorder.

Recorded at request of D. W. Parkhurst, August 3rd, A. D. 1875, at 1 p. m., in Liber 443 of Mortgages, page 309, in the office of the county recorder of the city and county of San Francisco, State of California.

[SEAL.] O. H. FRANK,
County Recorder.

Recorded at request of Wells, Fargo & Co., August 20, 1880, at 20 min. past 9 a. m., in Book 1 of Mortgages, page 557 *et seq.*, records of Merced county.

[SEAL.] $15. E. J. HAMILTON,
County Recorder,
By M. H. WALSH, *Deputy.*

Recorded at request of Wells, Fargo & Co., August 23d, A. D. 1880, at 5 min. past 9 o'clock a. m., in Vol. 15 of Mortgages, at pages 139 *et seq.*, records of Stanislaus county.

[SEAL.] $15 paid. JOHN McCOY, *Recorder.*

Recorded at request of J. L. Willcutt, September 6th, 1880, at 30 min. past 10 o'clock a. m., in Liber 624 of Mortgages, page 305, in the office of the county recorder of the city and county of San Francisco, State of California.

[SEAL.] W. K. DIETRICH,
County Recorder,
Per RICHARD BLEAUVELT, *Deputy.*

Endorsed: Filed July 9th, 1883. L. S. B. Sawyer, clerk, by J. F. O'Beirne, deputy clerk.

56 *Stipulation Waiving Jury.*

In Circuit Court U. S. A., District of California.

In the matter of the cases known as the Railroad Tax Cases.

It is hereby stipulated that juries are waived in all the cases now pending in this court and known as the Railroad Tax Cases.

Feb'y 26, 1884.

CREED HAYMOND,
Counsel & Att'y for Defendants in said Cases.
E. C. MARSHALL,
Attorney General and Attorney for Plaintiff.

Endorsed: No. 2757. Filed February 28, 1884. L. S. B. Sawyer, clerk.

57 *Judgment.*

United States of America, Circuit Court of the United States, Ninth Circuit, District of California.

COUNTY OF SAN BERNARDINO, Plaintiff,
vs
THE SOUTHERN PACIFIC RAILROAD COMPANY (a corporation), Defendant. } No. 2757.

An order of the court having been heretofore entered in this case, which reads as follows, to wit: "And now at this day a motion of Creed Haymond, Esq., attorney of record, having charge of this case for defendant, Hon. E. C. Marshall, attorney general of the State of California, attorney of record, and having charge of this case for and in behalf of the plaintiff, being personally pres-
58 ent in court, and both of said attorneys of record respectively representing the parties, plaintiff and defendant, consenting thereto in open court, it is ordered in pursuance of said consent that the order for judgment in favor of defendant heretofore entered herein be, and the same is, hereby set aside; and said attorneys of record for the respective parties, plaintiff and defendant, having further consented in open court that judgment be entered herein in favor of the plaintiff for the sum of $8,462.48, specified in a stipulation in writing signed by said attorneys of record respectively, now on this 29th day of February, 1884, filed in said cause as a part of the record thereof, it is further ordered in pursuance of said consent in open court, and in accordance with said stipulation in
59 writing, that judgment be entered in this cause in favor of the plaintiff and against said defendant for the sum of $8,462.48, of which said gross sum the sum of $3,853.49 is for the use and benefit of the county of San Bernardino, and the balance of $4,608.99 is for the use and benefit of the State of California, and for the sum of ten dollars costs."

Now, therefore, it is considered, ordered, and adjudged that the plaintiff have and recover from the defendant on the causes of action stated in the complaint, the sum of $8,462.48 dollars, and costs

taxed at — dollars; and it is further considered that of said sum of $8,462.48 the sum of $3,853.49 dollars is for the use and benefit of the county of San Bernardino, and the balance, $4,608.99 dollars, is for the use and benefit of the State of California.

60 Judgment entered this 29th day of February, 1884.

L. S. B. SAWYER, *Clerk.*

Endorsed: A true copy. Attest: [seal] L. S. Sawyer, clerk. Filed 29 February, 1884. L. S. B. Sawyer, clerk.

61 *Clerk's Certificate.*

UNITED STATES OF AMERICA:

Circuit Court of the United States, Ninth Circuit, District of California.

COUNTY OF SAN BERNARDINO
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY. } No. 2757.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States of the ninth judicial circuit, within and for the district of California, do hereby certify that the foregoing papers hereto annexed constitute the judgment roll in the therein-entitled action.

Witness my hand and the seal of said circuit court, this 29th day of February, A. D. 1884.

[SEAL.]

L. S. B. SAWYER, *Clerk,*
By F. D. MONCTON,
Deputy Clerk.

Endorsed: Judgment roll. Filed February 29th, 1884. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

62 At a stated term, to wit, the July term, 1883, of the circuit court of the United States of America of the ninth judicial circuit, in and for the district of California, held at the court-room, in the city and county of San Francisco, on Thursday, the nineteenth day of July, in the year of our Lord one thousand eight hundred and eighty-three.

Present: Hon. Stephen J. Field, Associate Justice of the Supreme Court of the United States; Honorable Lorenzo Sawyer, circuit judge.

Order Striking out Portion of the Answer.

THE COUNTY OF SAN BERNARDINO
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY. } No. 2757.

63 The motion heretofore argued and submitted to strike out portions of the amended answer herein having been duly considered, it is ordered that so much of the said answer as is contained in articles numbered 22, 34, 35, 36, 37, and 39, and that

portion of article 15 contained on the printed slip, being the last paragraph of the article, and the third paragraph of article 26, and all of article 28 after the first two paragraphs, be stricken out, as being matters of evidence, or immaterial matter; in other particulars the motion is denied.

To this order the defendant excepts, and to the refusal of the court to strike out other matter the plaintiff excepts.

64 At a stated term, to wit, the February term, A. D. 1884, of the circuit court of the United States of America of the ninth judicial circuit, in and for the district of California, held at the court-room, in the city and county of San Francisco, on Thursday, the 28th day of February, in the year of our Lord one thousand eight hundred and eighty-four.

Present: The Honorable Lorenzo Sawyer, circuit judge.

Order. Trial. Finding Waived.

THE PEOPLE OF THE STATE OF CALIFORNIA
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY. } No. 2757.

Ordered, that the order of continuance heretofore entered herein be and the same hereby is set aside.

65 This cause came on regularly this day for trial before the court, sitting without a jury, a trial by jury having been waived by written stipulation of counsel, Hon. E. C. Marshall, attorney general of the State of California, appearing for the plaintiff, and Creed Haymond, Esq., for the defendant. Thereupon documentary evidence was introduced, and the testimony being closed the cause was submitted to the court for consideration and decision.

And the same having been duly considered, it is ordered that judgment be entered herein in favor of the defendant, a finding having been waived by consent of counsel.

66 *Stipulation as to Judgment.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

People of the State of Cal.
vs.
Central Pac. R. R. Co. } No. 2755.

County of Fresno
vs.
Central Pacific R. R. Co. } No. 3093.

People of the State of Cal.
vs.
Central Pacific R. R. Co. } No. 2781.

People of the State of Cal.
vs.
Central Pacific R. R. Co. } No. 2778.

People of the State of Cal.
vs.
Central Pacific R. R. Co. } No. 3060.

People of the State of Cal.
vs.
Central Pacific R. R. Co. } No. 3061.

67

People of the State of Cal.
vs.
Central Pacific R R. Co. } No. 2786.

People of the State of Cal.
vs.
Central Pacific R. R. Co. } No. 2788.

People of the State of Cal.
vs.
Central Pacific R. R. Co. } No. 3108.

People of the State of Cal.
vs.
Central Pacific R. R. Co. } No. 2798.

People of the State of Cal.
vs.
Central Pacific R. R. Co. } No. 2797.

People of the State of Cal.
vs.
Central Pacific R. R. Co. } No. 3063.

County of Tehama
vs.
Central Pacific R. R. Co. } No. 2803.

68

People of the State of Cal.
vs.
Central Pacific R. R. Co. } No. 3071.

County of Alameda
vs.
Central Pacific R. R. Co. } No. 2820.

County of Alameda
vs.
Central Pacific R. R. Co. } No. 2819.

County of Stanislaus
vs.
Central Pacific R. R. Co. } No. 2825.

	County of Stanislaus *vs.* Central Pacific R. R. Co.	No. 2914.
	County of Stanislaus *vs.* Central Pacific R. R. Co.	No. 3073.
	People of the State of Cal. *vs.* Central Pacific R. R. Co.	No. 2840.
69	People of the State of Cal. *vs.* Central Pacific R. R. Co.	No. 2841.
	People of the State of Cal. *vs.* Central Pacific R. R. Co.	No. 3062.
	People of the State of Cal. *vs.* Southern Pacific R. R. Co.	No. 2756.
	County of Fresno *vs.* Southern Pacific R. R. Co.	No. 3094.
	County of San Bernardino *vs.* Southern Pacific R. R. Co.	No. 2757.
	County of San Bernardino *vs.* Southern Pacific R. R. Co.	No. 2829.
	County of San Bernardino *vs.* Southern Pacific R. R. Co.	No. 3064.
70	People of the State of Cal. *vs.* Southern Pacific R. R. Co.	No. 2789.
	People of the State of Cal. *vs.* Southern Pacific R. R. Co.	No. 2787.
	People of the State of Cal. *vs.* Southern Pacific R. R. Co.	No. 3109.
	County of Santa Cruz *vs.* Southern Pacific R. R. Co.	No. 2809.

County of Santa Cruz
vs.
Southern Pacific R. R. Co. } No. 2810.

People of the State of California
vs.
Southern Pacific R. R. Co. } No. 2835.

People of the State of Cal.
vs.
Northern Railway Co. } No. 2839.

71 People of the State of Cal.
vs.
Northern Railway Co. } No. 3096.

People of the State of Cal.
vs.
Northern Railway Co. } No. 3065.

County of Contra Costa
vs.
Northern Railway Co. } No. 3102.

County of Contra Costa
vs.
Northern Railway Co. } No. 3101.

County of Contra Costa
vs.
Northern Railway Co. } No. 3077.

County of Alameda
vs.
Northern Railway Co. } No. 2817.

County of Alameda
vs.
Northern Railway Co. } No. 2818.

72 The above-entitled actions having been tried upon the merits, and the court having announced its decision in favor of the defendants in each of said actions, and the defendants in each of said actions, notwithstanding the fact that the taxes therein sued for have been declared invalid, being minded to pay portions of the sums claimed, therefore defendants agree that, notwithstanding the decision aforesaid, judgments in favor of the plaintiff may be entered in said actions as follows:

In action No. 2755, above mentioned, in the gross sum of $14,216.64, and that of said gross sum the sum of $6,298.30 is for the use and

benefit of the county of Fresno, and the balance, $7,918.34, is for the use and benefit of the State of California.

In action No 3093, above mentioned, in the gross sum of
73 $18,684.36, and of said gross sum the sum of $12,497.76 is for the use and benefit of the county of Fresno, and the balance, $6,186.60, is for the use and benefit of the State of California.

In action No. 2781, above mentioned, in the gross sum of $14,494.16, and that of said gross sum the sum of $7,589.83 is for the use and benefit of the county of San Joaquin, and the balance, $7,359.33, is for the use and benefit of the State of California.

In action No. 2778, above mentioned, in the gross sum of $18,443.75, and that of said gross sum the sum of $9,151.44 is for the use and benefit of the county of San Joaquin, and the balance, $9,292.31, is for the use and benefit of the State of California.

In action No. 3060, above mentioned, in the gross sum of $14,823.00, and that of said gross sum the sum of $7,460.91 is for the use and benefit of the county of San Joaquin, and the balance,
74 $7,362.09, is for the use and benefit of the State of California.

In action No. 3061, above mentioned, in the gross sum of $2,244.00, and that of said gross sum the sum of $1,114.52 is for the use and benefit of the county of San Joaquin, and the balance, $1,129.48, is for the use and benefit of the State of California.

In action No. 2786, above mentioned, in the gross sum of $3,315.80, and that of said gross sum the sum of $1,675.24 is for the use and benefit of the county of Tulare, and the balance, $1,640.56, is for the use and benefit of the State of California.

In action No. 2788, above mentioned, in the gross sum of $3,744.63, and that of said gross sum the sum of $1,673.19 is for the use and benefit of the county Tulare, and the balance, $2,071.44, is for the use and benefit of the State of California.

In action No. 3108, above mentioned, in the gross sum of
75 $4,085.95, and that of said gross sum the sum of $2,804.25 is for the use and benefit of the county of Tulare, and the balance, $1,281.70, is for the use and benefit of the State of California.

In action No. 2798, above mentioned, in the gross sum of $3,543.02, and that of said gross sum the sum of $2,246.12 is for the use and benefit of the county of Sutter, and the balance, $1,296.90, is for the use and benefit of the State of California.

In action No. 2797, above mentioned, in the gross sum of $4,050.00, and that of said gross sum the sum of $2,412.50 is for the use and benefit of the county of Sutter, and the balance, $1,637.50, is for the use and benefit of the State of California.

In action No. 3063, above mentioned, in the gross sum of $2,625.00, and that of said gross sum the sum of $1,731.00 is for the use
76 and benefit of the county of Sutter, and the balance, $894.00, is for the use and benefit of the State of California.

In action No. 2803, above mentioned, in the gross sum of $5,257.61, and that the whole of said sum is for the use and benefit of the State of California.

In action No. 3071, above mentioned, in the gross sum of $3,624.27,

and that the whole of said sum is for the use and benefit of the State of California.

In action No. 2820, above mentioned, in the gross sum of $22,864.28, and that of said gross sum the sum of $11,927.32 is for the use and benefit of the county of Alameda, and the balance, $10,936.96, is for the use and benefit of the State of California.

In action No. 2819, above mentioned, in the gross sum of $28,600.53,
and that of said gross sum the sum of $14,924.13 is for the
77 use and benefit of the county of Alameda, and the balance, $13,676.40, is for the use and benefit of the State of California.

In action No. 2825, above mentioned, in the gross sum of $5,559.17, and that of said gross sum the sum of $2,624.29 is for the use and benefit of the county of Stanislaus, and the balance, $2,934.88, is for the use and benefit of the State of California.

In action No. 2914, above mentioned, in the gross sum of $6,732.43, and that of said gross sum the sum of $3,026.77 is for the use and benefit of the county of Stanislaus, and the balance, $3,705.66, is for the use and benefit of the State of California.

In action No. 3073, above mentioned, in the gross sum of $4,616.52, and that of said gross sum the sum of $2,323.65 is for the use and
benefit of the county of Stanislaus, and the balance, $2,292.87,
78 is for the use and benefit of the State of California.

In action No. 2840, above mentioned, in the gross sum of $14,622.50, and that the whole of said sum is for the use and benefit of the State of California.

In action No. 2841, above mentioned, in the gross sum of $18,462.83, and that the whole of said sum is for the use and benefit of the State of California.

In action No. 3062, above mentioned, in the gross sum of $16,677.57, and that the whole of said sum is for the use and benefit of the State of California.

In action No. 2756, above mentioned, in the gross sum of $4,807.80, and that of said gross sum the sum of $3,117.15 is for the use and benefit of the county of Fresno, and the balance, $1,690.65, is for the
use and benefit of the State of California.

79 In action No. 3094, above mentioned, in the gross sum of $3,388.77, and that of said gross sum the sum of $2,266.77 is for the use and benefit of the county of Fresno, and the balance, $1,122.06, is for the use and benefit of the State of California.

In action No. 2757, above mentioned, in the gross sum of $8,462.48, and that of said gross sum the sum of $3,853.49 is for the use and benefit of the county of San Bernardino, and the balance, $4,608.99, is for the use and benefit of the State of California.

In action No. 2829, above mentioned, in the gross sum of $9,829.67, and that of said gross sum the sum of $5,900.89 is for the use and benefit of the county of San Bernardino, and the balance, $3,928.78, is for the use and benefit of the State of California.

In action No. 3064, above mentioned, in the gross sum of
80 $9,631.45, and that of said gross sum the sum of $6,214.58 is for the use and benefit of the county of San Bernardino, and

the balance, $3,416.87, is for the use and benefit of the State of California.

In action No. 2789, above mentioned, in the gross sum of $21,002.68, and that of said gross sum the sum of $15,158.46 is for the use and benefit of the county of Tulare, and the balance, $5,844.22, is for the use and benefit of the State of California.

In action No. 2787, above mentioned, in the gross sum of $19,479.55, and that of said gross sum the sum of $12,781.06 is for the use and benefit of the county of Tulare, and the balance, $6,698.49, is for the use and benefit of the State of California.

In action 3109, above mentioned, in the gross sum of $12,365.01, and that of said gross sum the sum of $8,486.30 is for the
81 use and benefit of the county of Tulare, and the balance, $3,878.71, is for the use and benefit of the State of California.

In action No. 2809, above mentioned, in the gross sum of $591.58, and that of said gross sum the sum of $387.99 is for the use and benefit of the county of Santa Cruz, and the balance, $203.59, is for the use and benefit of the State of California.

In action No. 2810, above mentioned, in the gross sum of $709.50, and that of said gross sum the sum of $477.14 is for the use and benefit of the county of Santa Cruz, and the balance, $232.36, is for the use and benefit of the State of California.

In action No. 2835, above mentioned, in the gross sum of $4,159.84, and that of said gross sum the sum of $2,495.59 is for the use and benefit of the county of San Benito, and the balance, $1,664.25,
82 is for the use and benefit of the State of California.

In action No. 2839, above mentioned, in the gross sum of $3,763.23, and that of said gross sum the sum of $2,346.49 is for the use and benefit of the county of Solano, and the balance, $1,416.74, is for the use and benefit of the State of California.

In action No. 3096, above mentioned, in the gross sum of $4,255.39, and that of said gross sum the sum of $2,756.59 is for the use and benefit of the county of Solano, and the balance, $1,498.80, is for the use and benefit of the State of California.

In action 3065, above mentioned, in the gross sum of $3,424.75, and that of said gross sum the sum of $2,414.53 is for the use and benefit of the county of Solano, and the balance, $1,010.22, is
83 for the use and benefit of the State of California.

In action No. 3102, above mentioned, in the gross sum of $1,985.12, and that the whole of said sum is for the use and benefit of the State of California.

In action No. 3101, above mentioned, in the gross sum of $2,100.09, and that the whole of said sum is for the use and benefit of the State of California.

In action No. 3077, above mentioned, in the gross sum of $1,415.50, and that the whole of said sum is for the use and benefit of the State of California.

In action No. 2817, above mentioned, in the gross sum of $1,126.32, and that of said gross sum the sum of $553.81 is for the use and benefit of the county of Alameda, and the balance, $572.51, is for the use and benefit of the State of California.

84 In action No. 2818, above mentioned, in the sum of $1,166.40, and that of said gross sum the sum of $560.69 is for the use and benefit of the county of Alameda, and the balance, $605.71, is for the use and benefit of the State of California.

The costs in said action are taxed at ten dollars in each action.

And it is agreed that this stipulation shall be filed in each of said above-mentioned actions, and be and become part of the record therein.

CREED HAYMOND,
Attorney for Defendant.
E. C. MARSHALL,
Attorney Gen'l.

Endorsed: 2755, 2778, 2781, 2786, 2788, 2797, 2798, 2803, 2819, 2820, 2825, 2840, 2841, 2914, 3060, 3061, 3062, 3063, 3071, 3073, 3093, 3108, 2756, 2757, 2787, 2789, 2809, 2810, 2829, 2835, 3064, 3094, 3109, 2839, 3096, 3065, 3102, 3101, 3077, 2817, and 2818. Filed February 29, 1884. L. S. B. Sawyer, clerk.

85 *Bill of Exceptions.*

In the Circuit Court of the United States, Ninth Circuit, District of California.

THE COUNTY OF SAN BERNARDINO
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY. } No. 2757.

The above-entitled cause having, on the 29th day of February, 1884, been brought on to a hearing before the court, without a jury, the said parties, by stipulation in writing filed with the clerk, having waived a jury, evidence was introduced by the respective parties which proved—

I.

Defendant's organization.

In the year 1865 a corporation, under the name of the Southern Pacific Railroad Company, was duly organized under an act of the Legislature of the State of California, approved May 20, 1861, entitled "An act to provide for the incorporation of railroad companies, and the management of the affairs thereof, and other matters relating thereto," and the term of its existence was fixed at fifty years from the date of its organization.

II.

On the 24th day of July, 1860, the San Francisco and San Jose Railroad Company was duly incorporated under the laws of the State of California.

III.

The Legislature of California, on April 2, 1866, passed an act entitled "An act to authorize all the counties south of Santa Clara

county to aid in the construction of the Southern Pacific rail-
86 road," which statute is found in the statutes of 1865–'6 at page 816 *et seq.* Also a statute, on March 30, 1868, entitled "An act to confer power upon the board of supervisors of the city and county of San Francisco," which is found in the statutes of California for the years 1867–'8 at page 716. Also "An act to empower the city and county of San Francisco to aid in the construction of the Southern Pacific railroad, and other purposes," which is found in the statutes of California, 1869–'70, at page 707 *et seq.* All of which statutes are herein referred to and made a part of this bill of exceptions.

IV.

On July 27, 1866, Congress passed an act entitled "An act granting lands to aid in the construction of a railroad and telegraph line from the States of Missouri and Arkansas to the Pacific coast," which act of Congress is found in the United States Statutes at Large, vol. 14, at page 292 *et seq.*, and which act is herein referred to and made a part of this bill of exceptions.

V.

In November, 1866, the Atlantic and Pacific Railroad Company duly filed its acceptance of said act of Congress in the office of the Secretary of the Interior.

VI.

On the thirtieth day of November, 1866, said Southern Pacific Railroad Company duly filed, in the office of the Secretary of the Interior, at Washington, its acceptance of the said act of Congress of July 27, 1866.

VII.

The Legislature of the State of California, on April 4, 1870, passed an act entitled "An act to aid in giving effect to an act of Congress relating to the Southern Pacific Railroad Company," which act is found in the statutes of California for 1869–'70 at page 883, and is hereby referred to and made a part of this bill of exceptions.

VIII.

On March 3, 1871, Congress passed an act, entitled "An act to incorporate the Texas and Pacific Railroad Company, and to aid in the construction of its road, and for other purposes," which statute is found in vol. 16, U. S. Statutes at Large, at page 573 *et seq.*, and which is hereby referred to and made a part of this bill of exceptions.

IX.

On May 2, 1872, Congress passed "An act supplementary to an act entitled 'An act to incorporate the Texas Pacific Railroad Com-
pany, and to aid in the construction of its road, and for other
87 purposes,' approved March 3, 1871," which act is found in

vol. 17, U. S. Statutes at Large, page 59 *et seq.*, which statute is hereby referred to and made a part of this bill of exceptions.

X.

As such corporation, and in pursuance of the acts of the Legislature of California and acts of Congress referred to in these findings, said Southern Pacific Railroad Company constructed a line of railroad, and procured the rolling-stock and all the appurtenances thereunto belonging, known and designated as the Southern Pacific railroad, described as follows: Commencing on the waters of the Pacific Ocean in the city and county of San Francisco, and extending in a southerly direction through portions of the county of San Francisco, and through the county of Santa Clara to Tres Pinos, in the county of San Benito, with a branch therefrom running from Carnadero, in the county of Santa Clara, to Soledad, in the county of Monterey. Said line of railroad also extends from Huron, in Fresno county, to Goshen, in Tulare county, and thence in a southerly direction, by the way of Tehachapi Pass, Mohave, and Los Angeles, to the Colorado river at Fort Yuma, with three branches from said line at Los Angeles, extending, respectively, to Santa Monica, Wilmington, and Santa Ana, in the county of Los Angeles. Said line of railroad is connected with the Texas and Pacific railroad at Sierra Blanca, in the State of Texas, by three railroads, to wit: The Southern Pacific railroad (of Arizona), extending from Fort Yuma to the eastern boundary-line of Arizona; the southern Pacific railroad (of New Mexico), extending from said eastern boundary-line across New Mexico to the western boundary of Texas; and the Galveston, Harrisburg and San Antonio railroad, extending from said last-named boundary to Sierra Blanca. Said several railroads are operated as one continuous line, except the connection made over the Central Pacific road, as stated in finding No. XXXIII, from a point near Marshall, in Texas, to the Pacific Ocean at San Francisco, for the uses and purposes and in the manner contemplated by the acts of Congress hereinbefore referred to. From Tres Pinos to Huron the said Southern Pacific railroad has not been completed, but pending its construction connection between said points is made over the line of the Central Pacific railroad. Defendant, since the commencement of this action, has completed the construction of the said Southern Pacific railroad to the Colorado river, at or near the Needles, to connect with the Atlantic and Pacific railroad, hereinafter referred to, and, with the said Atlantic and Pacific railroad, when completed, making a continuous line from Springfield, in the State of Missouri, to the Pacific Ocean, with the same exceptions as to the connection over the Central Pacific, as contemplated by the act of Congress, hereinbefore referred to, chartering the Atlantic and Pacific Railroad Company.

88 XI.

Length of the road in the several counties.

Of said Southern Pacific railroad (of California) there had been, prior to the first Monday in March, 1880, completed, and there was

in operation in the several counties through which it runs, 711.51 miles, to wit: In the city and county of San Francisco, 7.36 miles; in the county of San Mateo, 25.10 miles; in the county of Santa Clara, 59.30 miles; in the county of Santa Cruz, 2.15 miles; in the county of San Benito, 17.65 miles; in the county of Monterey, 49.28 miles; in the county of Fresno, 17.93 miles; in the county of Tulare, 61.98 miles; in the county of Kern, 117.83 miles; in the county of Los Angeles, 139.48 miles; in the county of San Bernardino, 54.60 miles, and in the county of San Diego, 158.85 miles, and all within the State of California.

XII.

Said Atlantic and Pacific Railroad Company has nearly completed, and will within a short time have fully completed, the whole of said road from Springfield to the Colorado river, and defendant has constructed said road as aforesaid to Mojave, with the exception hereinbefore set out, and has completed the construction thereof from said Mojave to the junction of the road of the Atlantic and Pacific Company at Colorado river.

XIII.

On December 17th, 1877, the Southern Pacific Railroad Company and the Los Angeles and San Pedro Railroad Company, San Francisco and San Jose Railroad Company, and other railroad corporations, then duly incorporated and existing under the laws of the State of California, were duly amalgamated and consolidated under the provisions of the statutes of California, and a new corporation was formed, to wit, the defendant in this action. Since then said defendant has been and still is a corporation existing under the laws of the State of California, except in so far as its organization, existence, corporate character, and rights may be affected or modified by the Federal and State statutes, referred to in this bill of exceptions.

XIV.

Within due time the secretary of the defendant filed with the State Board of Equalization the sworn statement required by section 3664 of the Political Code of California.

89 XV.

Assessment of State board not given in evidence on trial.

No record of assessment as made by said State Board of Equalization was introduced as evidence on the trial; and there was no other evidence as to the assessment in question than as shown by the documents set out in these findings, or as shown by the facts stated in this bill of exceptions.

XVI.

The following is a copy of the assessment roll for the county of San Bernardino for the year 1880, so far as it relates to the tax in question in this case, and includes said tax, and is the only evidence of the assessment of said tax, no other record of the assessment as made by the State Board of Equalization having been introduced, to wit:

Taxpayer's Name.	Road district.	Residence. School district.	Description of Property. (Real estate other than city and town lots. Subdivision of sections.	Section.	Township.	Range.	Number of acres.	Value of real estate other than city and town lots.	Total value of all property.	Total value of all property after deductions.	Total value after equalization of the board of supervisors.	Total tax.
			Brought forward									$13,547 78
			Lands in the county of San Bernardino owned by the Southern Pacific Railroad Co., as follows, to wit:								3	05
S. P. Railroad Company.	Mojave	Mojave	S. ½ of	3	4 N.	7 W.	320	320	320	320	320	5 95
"	"	"	All of fractional	7	"	"	630	630	630	630	630	11 71
"	"	"	" "	5	"	"	630	630	630	630	630	11 71
"	"	"	All of	9	"	"	640	640	640	640	640	11 90
"	"	"	"	11	"	"	640	640	640	640	640	11 90
"	"	"	"	15	"	"	640	640	640	640	640	11 90
6-188. Dec. 18.	"	"	"	17	"	"	640	640	640	640	640	11 90
"	"	"	"	21	"	"	640	640	640	640	640	11 90
"	"	"	N. E. ¼ of	19	"	"	160	160	160	160	160	2 97
"	"	"	N. W. ¼ of	27	"	"	160	160	160	160	160	2 97
"	Cucamonga	Cucamonga	N. W. ¼ of N. W. ¼ of	13	1 N.	8 W.	60	60	60	60	60	1 47
"	"	"	Lots 1, 2, & 3	25	"	"	68	68	68	68	68	1 67
"	"	"	All of	35	"	"	640	640	640	640	640	15 74
"	San B	City Creek	All of tract	7	1 S.	2 W.	640	640	640	640	640	11 90
"	"	Lagonia	" "	19	"	"	640	640	640	640	640	11 90
"	"	"	All of	17	"	"	640	640	640	640	640	11 90
"	"	"	N. ½ of N. E. ¼ & N. ½ of N. W. ¼ & S. W. ¼ of N. W. ¼, W. ½ of S. W. ¼ of N. W. ¼, S. E. ¼ of S. W. ¼ of	21	"	"	320	320	320	320	320	5 95
"	"	"	S. E. ¼ & E. ½ of S. W. ¼ of	25	"	"	240	240	240	240	240	4 46
"	"	"	S. ½ of N. E. ¼ & S. E. ¼ of	29	"	"	240	240	240	240	240	4 46
"	"	"	W. ½ of	31	"	"	320	320	320	320	320	5 95
"	"	"	S. E. ¼ & W. ½ of	33	"	"	480	480	480	480	480	8 92
"	"	"	S. W. ¼ of	35	"	"	160	160	160	160	160	2 97
"	Cram	"	Tract N. E. ¼, E. ½ of N. W. ¼, S. ½ of	1	1 S.	3 W.	566	566	566	566	566	10 52
"	"	"	E. ½ of N. E. ¼, S. W. ¼ of N. W. ¼, W. ½ of N. W. ¼ of	3	"	"	219	219	219	219	219	4 07
"	"	"	E. ½ of lots 1 & 2 of N. E ¼, S. E. ¼ of	5	1 S.	5 W.	246	246	246	246	246	4 58
"	"	"	All of	9	"	"	640	640	640	640	649	11 90
"	"	"	"	11	"	"	640	640	640	640	640	11 90
"	"	Lagonia	"	13	"	"	640	640	640	640	640	11 90
"	"	"	"	23	"	"	640	640	640	640	640	11 90
"	"	"	"	35	"	"	640	640	640	640	640	11 90

"	"	S. ½ of S. E. ¼, S. ½ of S. W. ¼ of	15	"	"	160	160	160	160	160	2 97
"	"	N. ½ of	23	"	"	320	320	320	320	320	5 95
"	"	All of tract	31	"	"	636	636	636	636	636	11 82
"	Mt. Vernon	E. ½ of N. W. ¼, E. ½ of S. W. ¼, lots 1 & 2 of N. W. ¼, lots 3 & 4 of S. W. ¼ of	7	1 S.	4 W.	320	320	320	320	320	5 95
San Salvador	Colton	N. E. ¼ of N. W. ¼, S. E. ¼ of S. W. ¼, lots 1, 2, 3, 4, 5, & 8 of	19	"	"	320	320	320	320	320	5 95
San B. & Colton	Washington	S. ½ of N. E. ¼, S. E. ¼ of N. W. ¼, lots 1 & S. ½ of	33	"	"	471	471	471	471	471	8 76
Earl B	"	Lots 1 & 2 of N. E. ¼, S. ½ of N. E. ¼ of	35	"	"	158	158	158	158	158	2 93
San Salvador	San Salvador	Lots 3 & 4 of S. W. ¼ of	25	1 S.	5 W.	31	31	31	31	31	57
"	"	N. W. ¼ of	31	"	"	162	162	162	163	163	3 01
"	"	Lots 1 & 2 of N. E. ¼ of	33	"	"	67	67	67	67	67	1 26
Cucamonga	"	N. E. ¼ of	5	1 S.	6 W.	167	167	167	167	167	3 12
"	"	N. W. ¼ of	9	"	"	160	160	160	160	160	2 97
		Carried forward				16,751	16,751	16,754	16,754	16,754	13,863 84

Taxpayer's Name.	Description of Property. Real estate other than city and town lots. Subdivision of sections.	Value of real estate other than city and town lots.	Value of improvements thereon.	Value of personal property.	Total value of all property.	Total value of all property after deduction.	Total value after equalization by the board of supervisors.	Total tax.
S. P. Railroad Company.	Office of the State Board of Equalization, Sacramento, *May 13th*, 1880. To F. M. Johnson, *Assessor of San Bernardino County.* Sir: The State Board of Equalization on the 30th day of April, 1880, assessed for the year 1880 the Southern Pacific Railroad Company, for its franchise, roadway, rails, road-bed, and rolling-stock in the State of California at $10,483,518.00. The entire length of main track of railway of said company in said State is 711 56-100 miles. The length of the main track of said railway in the county of San Bernardino is 48 88-100 miles. The assessed value per mile of length of said main track of railway as fixed by a pro rata distribution of the assessed value of the whole property of said company in San Bernardino county is as follows: Of franchise per mile..... $2,000 00 Of roadway, road-bed, and rails per mile..... 10,800 00 Of rolling-stock per mile..... 1,933 15 The apportionment of the assessment of said property by the board for and to San Bernardino county is as follows: Franchise..... $97,760 00 Roadway, road-bed, rails, and rolling-stock..... 622,396 21 WARREN DUTTON, *Chairman.* D. M. KENFIELD, JAMES L. KING, T. D. HEISKELL, M. M. DREW, *State Board of Equalization.* E. W. MASLIN, *Clerk.*	.....	.....	.....	97,760 622,396	97,760 622,396	97,760 622,396	1,818 33 11,576 56 13,394 89
S. P. Railroad Company. Dec. 18.	48 88 100 miles of telegraph line in county..... Reservation with improvements thereon at Colton..... Reservation within improvements thereon at all other points..... Material, furniture, fuel, and all personal property..... $1,260 00	1,960	..... 3,500 1,500	 1,260	 8,220	 8,220	 8,220	.... 152 89
		1,960	5,000	1,266	728,376	728,376	728,376	13,547 78

92 XVII.

The board of supervisors of San Bernardino county duly apportioned said tax among the legal subdivisions of said county.

XVIII.

The delinquent list for the said year, so far as it relates to the tax in question, was duly made up in form corresponding with the original assessment roll.

XIX.

In pursuance of section 3738 of the Political Code of California, the board of supervisors of San Bernardino county duly passed an order, entered in the minutes, dispensing with the duplicate assessment roll for that county for that year.

XX.

The controller of the State transmitted a letter to the tax collector of San Bernardino county, in pursuance of the provisions of section 3899 of the Political Code, directing the tax collector of San Bernardino county to offer the property in question for sale but once, and if there were no *bona fide* purchasers to withdraw it from sale.

XXI.

On or about the eleventh day of April, A. D. 1880, the tax collector of the county of San Bernardino, in obedience to the provisions of section 3899 of the Political Code of California, transmitted to the controller of the State of California, with his indorsement thereon of the action had in the premises, a certified copy of the entry upon the delinquent list relative to the tax in question in this action. Said indorsement shows that said tax collector had offered said property for sale and withdrawn it because there was no purchaser for the same.

XXII.

The controller of State, in pursuance of the provisions of the same section, transmitted to the tax collector of said county a letter directing him to bring suit.

XXIII.

Indebtedness of defendant secured by mortgage.

On the first day of April, 1875, the defendant was indebted to divers persons in large sums of money advanced to construct and equip the defendant's railroad hereinbefore described. To secure the payment of such indebtedness the defendant, on the said first day of April, 1875, executed and delivered a mortgage to D. O. Mills and Lloyd Tevis upon said Southern Pacific railroad, its franchises, and all rolling-stock and appurtenances, and upon a large number of tracts of land, aggregating over eleven million acres, situated in different
93 counties in the State of California, which said tracts of land were, and ever since have been, the property of the defendant,

and which said indebtedness amounts to the sum of $32,500,000, no part of which has ever been paid, except the accruing interest; and the sum of $1,632,000 of the principal and the whole of the balance of said principal sum, amounting to $30,898,000, is, and ever since the execution of said mortgage has been, a valid and subsisting indebtedness against said company, and has been, and still is, secured by said mortgage, a copy of which, with the indorsement thereon, is annexed to the answer in this case, which is hereby referred to, and made a part of this finding, which said mortgage was duly recorded on the date mentioned in the indorsement thereon, in the county of San Bernardino, as well as in all other counties through which said railroad runs, as shown by the several indorsements thereon.

XXIV.

At the session of the Legislature of 1881 a bill was introduced in the Assembly of said Legislature, of which the following is a true copy, and that such proceedings were thereupon had in said Legislature as are hereinafter set forth. Said bill was an amendment to section 3664 of the Political Code of the State of California, which section, prior to said amendment, read as follows, to wit:

SECTION 3664. "On or before the first Monday in May, in each year, the State Board of Equalization shall assess the franchise, roadway, road-bed, rails, and rolling-stock of railroads operated in more than one county. The president, secretary, cashier, or managing agent, or such other officer as the State Board of Equalization may designate, of any corporation operating any railway in more than one county in this State, shall furnish said board, on or before the first Monday of April in each year, a statement, signed and sworn to by one of the officers, showing in detail for the year ending on the first Monday in March in such year:

(*a.*) The whole number of miles of railway owned, operated, or leased in the State by such corporation making the return, and the value thereof per mile, with a detailed statement of all property of every kind located in the State.

(*b.*) Also, a detailed statement of the number and value thereof of engines, passenger, mail, express, baggage, rolling-stock in use on the corporation's line in the State during the year for which the return is made. The return shall show the amount of rolling-stock, the annual gross earnings of the entire railway, and the proportionate annual gross earnings of the same in this State, as nearly as practicable, and all the property designated hereafter in this section, and such other facts as the State Board of Equalization may in writing require.

If such officer or officers so designated shall fail to make and furnish such statement, said Board of Equalization shall fix the value and proceed to assess the property of the corporation so failing; the valuation fixed by them shall be final and conclusive.

The said property shall be assessed at its actual value.

94 Assessments shall be made upon the entire railway within the State, and shall include the right of way, road-bed, track,

bridges, culverts, and rolling-stock. The depots, station grounds, shops, buildings, and gravel-beds, shall be assessed by the assessor of the county where situated as other property. On or before the fifteenth day of May in each year said board shall transmit to the county assessor of each county through which any railway, operated in more than one county, may run, a statement showing the length, of the main track, or tracks, of such railway within the county, together with a description of the whole of said tracks within the county, including the right of way by metes and bounds, or other description sufficient for identification, and the assessed value per mile of the same, as fixed by a *pro rata* distribution per mile of the assessed value of the whole franchise, roadway, road-bed, rails, and rolling-stock of such railway within this State.

Said statement shall be entered on the assessment-roll of the county. At the first meeting of the board of supervisors, after such statement is received by the county assessor, they shall make and cause to be entered in the proper record book an order stating and declaring the length of the main track, and the assessed value of such railway lying in each city, town, township, school district, or lesser taxing district in their county through which such railway runs, as fixed by the State Board of Equalization, which shall constitute the taxable value of said property for taxable purposes in such city, town, township, school, road, or other district; and the clerk of the board of supervisors shall transmit a copy of each order or equalization to the city counsel or trustees, or other legislative body of incorporated cities or towns, the trustees of each school district, and the authorized authorities of other taxation districts through which such railway runs. The taxes on said property, for State and county purposes, after collection by the county collector, shall be paid over to the county treasurer as other taxes. All such railway property shall be taxable upon said assessment, at the same rates, by the same officers, and for the same purposes as the property of individuals within such counties, cities, towns, townships, school districts, and lesser taxation districts."

And the said amendment is in the following words:

"respectively, any person dissatisfied with an assessment made by said Board of Equalization against his or its property may, within five days after such assessment is made and entered of record on the books of said board, by written petition apply to said board to have the same corrected in any particular. Said petition must state the grounds of objection to such assessment, and must be filed with the clerk of the board. The board must fix a time for hearing said petition, which must not be less than five not more than ten days from the time the same is filed, and must, upon such hearing, receive such proofs as may be offered by the petitioner, or by the attorney general, or any other person appearing against such petition, and such other proofs as, in the judgment of the board, bear upon the question at issue. By an order of the board or upon the demand of the petitioner, the proofs shall be reduced to writing by a phonographic reporter. If the board do not order the

proofs to be reduced to writing by such reporter, but the same is done upon the demand of the petitioner, the petitioner must pay the expenses thereof. After hearing such proofs
95 the board shall, within ten days, determine, in writing, upon the matters involved in the petition and proofs, and may alter, in conformity with such determination, the assessment complained of. Any person feeling aggrieved at such determination who shall pay the tax upon the assessment complained of, and may, within ten days after such payment, bring an action in the superior court, in the county in which the tax, or any part thereof, has been paid against the Board of Equalization, and in the complaint may allege any fact averred in his petition, filed with said board, showing the illegality of such tax in whole or in part, or that the property, in whole or in part, was assessed for more than its actual value.

A copy of the complaint must, within thirty days after it has been filed, be served upon the chairman or clerk of said board, and said board shall have thirty days in which to answer or demur to the same. At the time the board answers or demurs it may demand that the suit be tried in the superior court of Sacramento county.

The provisions of the Code of Civil Procedure relating to pleadings, proofs, trials, and appeals, shall be applicable to the proceedings herein provided for, and the testimony taken before the Board of Equalization may be read in evidence; and in such proceeding the court shall have power to determine the matters involved in the issue, and, in making such determination, may ascertain whether the property was taxed or assessed in proportion to its value, and if the determination is in favor of the petitioner, as to the illegality of the tax, in whole or in part, in excess of its actual value, it shall, by its judgment, direct the return of the tax paid, or of such part thereof as may have been illegally exacted, or exacted in excess of the actual value of the property.

Upon presentation of a certified copy of such final judgment to the controller, he shall draw his warrant upon the State treasurer for the amount of such judgment, and the treasurer shall pay the same out of any funds in the State treasury not otherwise appropriated. At the next settlement, made thereafter by the controller with the county treasurer of any county that received any portion of said illegal tax, he shall require the treasurer thereof to pay such portion into the State treasury, to reimburse the State for the advance made on said judgment. The Board of Equalization may direct the district attorney of any or every county interested, and the attorney general to defend for such board any proceedings commenced under the provisions of this section."

The said amendatory bill was entitled "An act to amend an act to establish a political code, approved March 12, 1872, by adding thereto two new sections, to be known as sections 3664 and 3665, relating to the assessments of the railroads and other property by the State Board of Equalization and county assessors for the purposes of taxation." Said bill, in the due course of business, was passed by the Assembly, and contained all the matter which is found in said section 3664, as first above quoted.

Having passed the Assembly, the bill was transmitted to the Senate. The Senate amended section 3664 by adding thereto the latter portion of the matter hereinbefore quoted. Upon the return
96 of the bill to the Assembly the following proceedings were had, as appears on the Journal of that body:

"The consideration of Senate amendment to Assembly bill No. 475, 'An act to amend an act entitled an act to establish a political code,' approved March 12, 1872, by adding thereto two new sections, to be known as sections 3664 and 3665, relating to assessments of railroads and other property by the State Board of Equalization and county assessors for the purpose of taxation," resumed.

"The previous question was demanded by Messrs. Edwards, Jackson, and Paulk.

"The ayes and noes were demanded by Messrs. Paulk, Whipple, and Del Valle.

"The roll was called, and the House refused to order the main question, by the following vote:

"Ayes: Messrs. Arick, Brown, Burns, Cameron, Crank, Daggett, Edwards, Gay, Geary, Gilmore, Hartshorn, Hoitt, Holden, Jackson, Jones, Kellogg, Kilburn, Lane, May, McCallion, McClure, McDonald, Mein, Mudgett, Noonan, Patterson of San Joaquin, Reddick, Reynolds, Streeter, Swift, Wasson of Ventura, Wasson of Mono, Young, and Mr. Speaker—34.

"Noes: Messrs. Baker of Sacramento, Baker of Yolo, Birney, Bost, Branch, Chandler, Colman, Crumpton, Cunningham, Del Valle, Felton, Fraser, Freer, Garrity, Gavigan, Griffith, Hale, Hendrick, Henshaw, Howard, Keating, Leach, Leake, Lewis, Long, Matthews of Tehama, Matthews of San Benito, McMurray, Murphy, O'Connor, Patterson of Nevada, Paulk, Pinder, Platt, Samuels, Sargent, Siebe, Van Fleet, Wentz, Wertsbaugher, Whipple, and Wood —42."

After the transaction of other business, the printed Journal proceeds:

"The consideration of Senate amendment to Assembly bill 475 resumed.

"The question recurred on concurring therewith.

"The ayes and noes were demanded by Messrs. Palk, Sargent, and Wentz.

"The roll was called, and the Speaker declared the House had concurred in the Senate amendments:

"Ayes: Messrs. Arick, Baker of Sacramento, Birney, Bost, Brown, Burns, Crank, Daggett, Edwards, Estee, Felton, Garrity, Gavigan, Geary, Gilmore, Hartshorn, Hoitt, Holden, Howard, Jackson, Keating, Kellogg, Laine, Mason, May, McCallion, McClure, McDonald, Mein, Noonan, O'Connor, Patterson of San Joaquin, Pinder, Reddy, Streeter, Swift, Van Fleet, Warkins, Wasson of Mono, Young, and Mr. Speaker—39.

"Noes: Messrs. Alviso, Baker of Yolo, Branch, Chandler, Colman, Cunningham, Del Valle, Fraser, Gay, Griffith, Hale, Hendrick, Henshaw, Jones, Leake, Leach, Lewis, Long, Matthews of San Benito,

McMurray, Murphy, Patterson of Nevada, Paulk, Platt, Reynolds, Samuels, Sargent, Siebe, Wasson of Ventura, Wentz, Wertsbaugher, Whipple, and Wood—32."

The following is a copy, on the same point and vote, of the original written Journal of the Assembly, deposited in the office of the secretary of State, showing the last action of the House on Senate bill No. 475:

97 *California Legislative Assembly, Twenty-fourth Session.*

ASSEMBLY CHAMBER, FRIDAY, *March* 4, 1881.

Consideration of Senate amendments to assembly bill No. 475 resumed.

The question recurred on concurring therewith.

The ayes and noes were demanded by Messrs. Paulk, Sargent, and Wentz. Roll called. The House concurred in Senate amendments by the following vote:

Ayes—Arick, Baker of Sacramento, Birney, Bost, Brown, Burns, Crank, Daggett, Estee, Edwards, Felton, Garrity, Gavigan, Geary, Gilmore, Hartson, Hoitt, Holden, Howard, Keating, Kellogg, Lane, Mason, May, McCallion, McClure, McDonald, Mein, Noonan, O'Connor, Patterson of San Joaquin, Pinder, Reddy, Streeter, Swift, Van Fleet, Warkins, Wasson of Mono, Young, and Mr. Speaker—39.

Noes—Alviso, Baker of Yolo, Branch, Chandler, Coleman, Cunningham, Del Valle, Fraser, Gay, Griffith, Hale, Hendrick, Henshaw, Jones, Leach, Leake, Lewis, Long, Matthews of San Benito, McMurray, Murphy, Patterson of Nevada, Paulk, Platt, Reynolds, Samuels, Sargent, Siebe, Wentz, Wasson of Ventura, Wertsbaugher, Whipple, and Wood—32.

Matthews of Tehema and Kilburn paired, Kilburn voting aye and Matthews no. Messrs. Cameron and Crumpton paired; Cameron aye, Crumpton no.

The following facts also appear from the Journal:

Other business having intervened, "the consideration of Senate amendments to Assembly bill No. 475 resumed, the speaker declaring that this was not the final action on the bill, and that the House had concurred in Senate amendments to Assembly bill No. 475, by a vote of 39 ayes to 32 noes. Mr. Paulk appealed from the decision of the chair on the ground that forty-one votes were required for concurrence. The question recurred, shall the decision of the chair stand as the judgment of the House?"

After other business, on motion, the appeal was laid on the table by a vote of 38 ayes to 23 nays.

Mr. Hale then entered his protest against the decision of the Speaker, on the ground that forty-one members voting in the affirmative are necessary to adopt the amendments, the vote on concurring in the amendments being the only action of the House thereon. Thereupon again: "The Speaker stated that the action on the Senate amendments to the bill was not the final action on the bill, and consequently a concurrence or non-concurrence in the amendments required a majority vote only."

Mr. Griffith and Mr. Kellogg then each entered his protest against the decision of the Speaker, declaring the Senate amendments concurred in on the ground that a concurrence required a majority of the whole House.

No other vote was had, or other announcement by the Speaker made in regard to this bill. No other action was had by the House except that on March 4, being the last act before adjournment *sine die*, the bill was reported as correctly enrolled, and as having been presented to the Governor for approval. No action was taken on this report, and the bill does not appear to have been reported to the House as having been approved.

98 XXV.

Mortgaged lands, mode and manner of assessment—payment of taxes.

The lands mentioned in the finding XXIII are not, and never have been, in any way used in connection with the railroad business of the defendant, but are agricultural, grazing, and other lands, granted to said defendant under the acts of Congress hereinbefore mentioned for the purpose in said acts provided, and so far as patented are distributed in the respective counties in the following quantities: In Santa Clara county, 3,138 acres; San Benito county, 1,879 acres; Monterey county, 1,879 acres; Stanislaus county, 32,242 acres; Merced county, 20,655 acres; Fresno county, 18,789, acres; Tulare county, 260,315 acres; Kern county, 168,096 acres; Los Angeles county, 38,033 acres; San Bernardino county, 30,686 acres; San Diego county, 5,737 acres.

Said patented lands, and all of them, for each of the years 1880, 1881, and 1882, were assessed, including those situated in the county of San Bernardino, by the assessors of the respective counties in which they are situated, at their full cash values, and no deduction from said value was made or allowed on account of said mortgage or the indebtedness secured thereby; on the contrary, the laws of the State of California under which said assessors acted in making their assessments prohibited any deduction from said values on account either of the mortgage or the indebtedness secured thereby.

In each of said years 1880, 1881, and 1882 the defendant paid in full, at the time the same became payable, all the taxes levied upon said lands for State, county, and municipal purposes, without any deduction on account of said mortgage.

XXVI.

The whole of said property assessed by the State board to the defendant.

The State Board of Equalization in assessing said value of said property to and against defendant assessed the full cash value of said railroad, roadway, road-bed, rails, rolling-stock, and franchises, without deducting therefrom the value of the mortgage or any part thereof, given and existing thereon as aforesaid, to secure the in-

debtedness of said company to the holders of said bonds, notwithstanding they had full knowledge of the existence of the said mortgage; and in making said assessment the said State Board of Equalization did not consider or treat said mortgage as an interest in said property, but assessed the whole value thereof to the defendant in the same manner as if there had been no mortgage thereon.

99 XXVII.

Other corporations of various kinds.

At, before, and ever since the adoption of the constitution of California, now in force, there were, and are, existing under the laws of said State, corporations of various kinds, formed for the purpose and actually operating and doing business, and holding and using property in more than one county in said State. Corporations in the said State of California now are, and ever have been, formed under general laws relating thereto, and there have ever existed corporations formed under its said laws for fire, marine, mutual life, health, and accident insurance; building ferries, constructing and operating roads, railroads, wagon-roads, telegraphs, bridges, wharves, chutes, and piers, and for constructing and operating canals, for the purpose of acquiring lands in large tracts and distributing them as homesteads among the corporators for savings and loans, for mining, for the sale and distribution of water in the cities and towns for manufacturing, mechanical, and agricultural purposes; for benevolent, charitable, and educational purposes, cemeteries, agricultural fairs, and various other purposes.

There is now, and for more than three years last past has been, a railroad in use and operation, extending from the city of Marysville, in the county of Yuba, to the town of Oroville, in the county of Butte, in said State, a distance of 26½ miles, which said road now is, and ever has been, operated in more than one county in this State, and has the same gauge as the road of this defendant, and has ever been operated in like manner, and for like uses and purposes, and is now, and for more than two and a half years last past has been, in the ownership and under the operation and control of one N. D. Rideout, a natural person and citizen of the United States, and resident of the State of California.

XXVIII.

Rules of equality as regards the system adopted by said board.

The State Board of Equalization, in making the supposed assessment of said roadway of defendant, did knowingly and designedly include in the valuation of said roadway the value of fences erected upon the line between said roadway and the land of coterminous proprietors. Said fences were valued at $300 per mile.

XXIX.

The Legislature of the State of California, on the 27th day of March, A. D. 1862, passed an act entitled "An act to provide for the

construction of a railroad from Mokelumne City to Wood-
100 bridge, in the county of San Joaquin," which act is found in the statutes of California for 1862, at page 97, and is hereby made a part of these findings.

On the 29th day of March, A. D. 1878, the Legislature of the State of California passed an act entitled "An act to provide for the construction of a railroad from the town of Truckee, Nevada county, to Tahoe City, Lake Bigler, in Placer county, and to regulate fares and freights thereon," which act is found in the statutes of California for 1877–'8, at page 698 *et seq.*, and is hereby made a part of this finding.

At the same session said Legislature passed another act, on the 30th day of March, A. D. 1878, entitled "An act to provide for the construction of a railroad from Ione, in the county of Amador, to a point in or near the towns of Sutter Creek or Jackson, in said county, and to regulate fares and freights thereon," which act is found in the same volume of said statutes of California, at page 841 *et seq.*, and is hereby referred to and made a part of this finding.

Numerous other acts of a similar character are found scattered through the annual volumes of the statutes of California. It does not appear from the evidence whether said acts have been acted upon by the grantees therein named or not.

XXX.

The California Northern Railway is a railway having the standard gauge of four feet eight inches and a half—being the same gauge as that of the Southern Pacific Railroad of California—extending from Marysville, in Yuba county, to Oroville, in Butte county, a distance of twenty-six and one-half miles, twelve and one-half miles being in Yuba and fourteen in Butte county, built and formerly owned and operated by the California Northern Railway Company, a corporation organized under the laws of California. On the 30th day of July, A. D. 1881, the said railway was sold under a decree of foreclosure of mortgage upon said road, and at said sale purchased by N. D. Rideout, a natural person, who received a conveyance thereof in pursuance of said sale, went into possession thereof, and has ever since—being about two years and a half—possessed and operated, and he is now possessed of and operating said railway, claiming to be the owner thereof under said decree of foreclosure and sale, and since said sale said railway has been assessed—or purported to be assessed—to, and the taxes claimed to have been levied thereon have been paid by, said Rideout.

XXXI.

The roadway occupied by the defendant varies in width from thirty feet to two hundred feet on the Southern division, which division embraces the portion of said railroad situate in the county of San Bernardino, and is a little over 54½ miles in length.

101 XXXII.

That the Southern division of said Southern Pacific railroad is operated by said corporation as a separate railway. It has no physical connection with the Northern division thereof by any constructed road forming a part of said road. It is separated therefrom by the Coast Range of mountains. The nearest point at which the railway of the Northern division approaches that of the Southern is over eighty miles. No passengers or freight are carried from one division to the other, except upon the section of the Central Pacific railroad which connects the two divisions by way of Lathrop and Niles and San Francisco, a division of two hundred and fifty miles in length. The corporation requested the board of equalization to assess each division of said railway separately. In pursuance of said request said board did so.

The Southern division of the Southern Pacific railroad runs through the counties of Fresno, Tulare, Kern, Los Angeles, San Bernardino, and San Diego.

Neither said tax nor any part thereof has been paid, except the sum of —— dollars, which was paid on the — day of —— without prejudice.

XXXIII.

There was no testimony or facts in the case other than as appears in these findings to countervail the effect or legal operation of any of the documents stated in these findings.

XXXIV.

The defendant, by its agent, appeared before the Board of Equalization, both before and after said assessment was made by said board, and asked to have the said assessment reduced, but after having been heard the board refused to reduce said assessment. The ground of refusal does not appear, the defendant having offered to show the ground of refusal by the testimony of one of the members of said board, and said testimony having been excluded as incompetent by the court upon the objection of plaintiff.

102 And be it further remembered, that upon the foregoing evidence the court gave judgment for the defendant; to which ruling of the court in giving judgment for the defendant the plaintiff duly excepted.

And be it further remembered, that after said judgment was ordered, the defendant, being minded to pay, notwithstanding the fact that the tax had been declared invalid, the full amount of said tax due without penalty, interest, or counsel fees, and to leave the question of its liability for said penalty, interest, and counsel fees to be finally determined by the Supreme Court of the United States in cases already pending there, or in this case if appealed or

103 taken there upon a writ of error, agreed for the purposes aforesaid that the judgment in its favor might be set aside and judgment in favor of the plaintiff be entered for the full amount

of said tax, less penalties, interest, and counsel fees; which was done.

And be it further remembered, that before said judgment for the defendant was set aside, and in open court, it was stipulated and agreed by and between the attorneys for the plaintiff and defendant that if said judgment was set aside and judgment for the plaintiff entered as aforesaid, the said defendant should not be deemed to have admitted thereby the validity of the taxes claimed or
104 any part thereof, nor should said judgment be treated upon an appeal or proceedings under writ of error as a consent judgment; defendant then and there expressly waiving that point, if point it was.

And be it further remembered, that the object and purpose of the proceeding then had was to enable the defendant to pay into the State and county treasuries on account the sum for which the judgment was rendered, without prejudice to the right of the plaintiff in the case to proceed for penalties, interest, and attorneys' fees claimed, and in order that the litigation might be brought to a speedy conclusion.

The plaintiff tenders this its bill of exceptions, which,
105 being agreed to by the respective attorneys for the parties, is allowed, signed, sealed, and made a part of the record of the court.

(Signed) LORENZO SAWYER,
Circuit Judge.

Endorsed: Filed March 29th, 1884. L. S. B. Sawyer, clerk.

106 *Bond on Writ of Error.*

In the Supreme Court of the United States.

THE COUNTY OF SAN BERNARDINO, Plaintiff in Error,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY, a Corporation, Defendant in Error. } No. 2757.

Know all men by these presents, that we, Louis Marshall and H. A. Greene, are held and firmly bound unto the Southern Pacific Railroad Company, defendant in error herein, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said The Southern Pacific Railroad Company, its successors or assigns; to the payment of which, well and truly to be made, we bind ourselves and each of us, jointly and severally,
107 and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals. Dated the 2d day of August, 1884.

Whereas the above-named The County of San Bernardino has prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered by the circuit court of the United States of America for the district of California, in the cause entitled The County of San Bernardino against The Southern Pacific Rail-

road Company, a corporation (No. 2757): Now, therefore, the condition of this obligation is such that if the above-named The County of San Bernardino, plaintiff in error, shall prosecute its said writ of error to effect, and answer all costs if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

H. A. GREENE. [SEAL.]
LOUIS MARSHALL. [SEAL.]

Signed, sealed, and delivered in presence of—
L. S. B. SAWYER.

108 UNITED STATES OF AMERICA, } ss:
District of California, }

Louis Marshall and H. A. Greene, being duly sworn, each for himself deposes and says: That he is a householder in said district, and is worth the sum of five hundred dollars in lawful money of the United States of America exclusive of property exempt from execution, and over and above all debts and liabilities.

LOUIS MARSHALL.
H. A. GREENE.

Subscribed and sworn to before me, this second day of August, 1884.

[SEAL.] J. H. BLOOD,
Notary Public in and for the City and County of San Francisco, State of California.

Endorsed: The form of the within bond and the sufficiency of the sureties therein are hereby approved. (Signed) Lorenzo Sawyer, U. S. circuit judge, 9th judicial circuit. Filed 6 August, 1884. L. S. B. Sawyer, clerk.

109 In the Circuit Court of the United States for the District of California.

THE COUNTY OF SAN BERNARDINO
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY, a Corporation. } No. 2757.

I, L. S. B. Sawyer, clerk of the circuit court of the United States, of the ninth judicial circuit, in and for the district of California, do hereby certify that the foregoing one hundred [and] eight written and printed pages, numbered from 1 to 108, inclusive, are a full, true, and correct copy of the record and all proceedings in the above-entitled cause, and that the same together constitute the return to the annexed writ of error.

Witness my hand and the seal of said circuit court, this 6th day of August, A. D. 1884.

[SEAL.] L. S. B. SAWYER, *Clerk.*

110 UNITED STATES OF AMERICA, *ss*:

The President of the United States of America to the judges of the circuit court of the United States, of the ninth judicial circuit, in and for the district of California, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea which is in the said circuit court, before you, between The County of San Bernardino, plaintiff in error, and The Southern Pacific Railroad Company, a corporation, defendant in error, a manifest error hath happened, to the great damage of the said plaintiff in error, as by its complaint appears, and it being fit that the error, if any there hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at the city of Washington, in the District of Columbia, on the second Monday of October next, in the said Supreme Court to be there and then held, that the record and proceedings aforesaid be inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this 6th day of August, in the year of our Lord one thousand eight hundred and eighty four, and of the Independence of the United States the one hundred and ninth.

[SEAL.] L. S. B. SAWYER, *Clerk.*

The above writ of error is hereby allowed.

LORENZO SAWYER,
Circuit Judge.

111 *The Answer of the Judges of the Circuit Court of the United States for the District of California.*

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify, under the seal of our said court, to the Supreme Court of the United States, within mentioned, at the day and place within contained in a certain schedule to this writ annexed, as within we are commanded.

By the court:

[SEAL.] L. S. B. SAWYER, *Clerk.*

[Endorsed:] No. 2757. United States Supreme Court. The County of San Bernardino, pl'ff in error, *vs.* The Southern Pacific Railroad Company, def't in error. Writ of error. Filed 6 August, 1884. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

112 UNITED STATES OF AMERICA, *ss:*

To the Southern Pacific Railroad Company, a corporation, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, in the District of Columbia, on the 13th day of October, A. D. 1884, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States in and for the district of California, wherein The County of San Bernardino is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable Lorenzo Sawyer, judge of the circuit court of the United States for the district of California, this 6th day of August, A. D. 1884, and of the Independence of the United States the one hundred and ninth.

[SEAL.] LORENZO SAWYER,
U. S. Circuit Judge, 9th Judicial Circuit.

113 [Endorsed:] No. 2757. In the Supreme Court of the United States. The County of San Bernardino, pl'ff in error, *vs.* The Southern Pacific Railroad Company, def't in error. Citation. Service of a copy of the within citation is hereby acknowledged. Aug. 6, 1884. Creed Haymond, counsel for def't in error. Filed August 6, 1884. L. S. B. Sawyer, clerk. F. D. Moncton, deputy clerk.

Endorsed on cover: California C. C. U. S. No. 982. The County of San Bernardino, plaintiff in error, *vs.* The Southern Pacific Railroad Company. Filed 3d October, 1884.

118-394+417

RECEIVED
JAN 19 1886
JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 619.

THE COUNTY OF SAN BERNARDINO,
Plaintiff in error,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF CALIFORNIA.

ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

IN THE

SUPREME COURT

OF

THE UNITED STATES.

OCTOBER TERM, 1885.

No. 619.

THE COUNTY OF SAN BERNARDINO,
Plaintiff in error,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY.

In error to the Circuit Court of the United States for the District of California.

ARGUMENT ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT.

The Central Pacific Railroad Company and the Southern Pacific Railroad Company are corporations, existing under the laws of California for the formation of railroad corporations. For the three fiscal years of 1880, 1881, and 1882, these companies refused to pay the taxes assessed against them, and to recover these taxes, the State brought suit in the State Courts. The companies, claiming protection under the Four-

teenth Amendment of the Constitution of the United States, procured the litigation to be removed into the Circuit Court of the United States.

The chief grounds alleged by the corporations as reasons for escaping taxation were, that the revenue system adopted by the Constitution and the laws of California is, as to them, in violation of the Fourteenth Amendment of the Constitution of the United States; because, *First*, it deprives them of their property without due process of law; and, *Secondly*, it deprives them of the equal protection of the laws.

The provisions of the Constitution and laws bearing upon the question, are as follows:

"CONSTITUTION OF 1879.

"ARTICLE XIII.

"REVENUE AND TAXATION.

"SECTION 1. All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership; *provided*, that growing crops, property used exclusively for public schools, and such as may belong to the United States, this State, or to any county or municipal corporation within this State, shall be exempt from taxation. The Legislature may provide, except in the case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to *bona fide* residents of this State.

"SEC. 4. A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. *Except as to railroad and other quasi-public corporations*, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situate. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so

secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment, a full discharge thereof; *provided*, that if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy of the preceding year.

"SEC. 9. A State Board of Equalization, consisting of one member from each Congressional District in this State, shall be elected by the qualified electors of their respective districts at the general election to be held in the year one thousand eight hundred and seventy-nine, whose term of office, after those first elected, shall be four years, whose duty it shall be to equalize the valuation of the taxable property of the several counties in the State for the purposes of taxation. The Controller of State shall be *ex officio* a member of the Board. The Boards of Supervisors of the several counties of the State shall constitute Boards of Equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation; *provided*, such State and county Boards of Equalization are hereby authorized and empowered, under such rules of notice as the County Boards may prescribe, as to the county assessments, and under such rules of notice as the State Board may prescribe as to the action of the State Board, to increase or lower the entire assessment roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment roll, and make the assessment conform to the true value in money of the property contained in said roll.

"SEC. 10. All property, except as hereinafter in this section provided, shall be assessed in the county, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, roadway, roadbed, rails, and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts.

"SEC. 13. The Legislature shall pass all laws necessary to carry out the provisions of this article.

"POLITICAL CODE OF CALIFORNIA,

"AS AMENDED IN 1880.

"SEC. 3664. On or before the first Monday in May, in each year, the State Board of Equalization shall assess the fran-

chise, roadway, roadbed, rails, and rolling stock of railroads operated in more than one county. The President, Secretary, Cashier, or Managing Agent, or such other officer as the State Board of Equalization may designate, of any corporation operating any railway in more than one county in this State, shall furnish such Board, on or before the first Monday of April in each year, a statement, signed and sworn to by one of such officers, showing in detail for the year ending on the first Monday in March in such year:

"*(a)* The whole number of miles of railway owned, operated, or leased, in the State by such corporation making the return, and the value thereof per mile, with a detailed statement of all property of every kind located in the State.

"*(b)* Also a detailed statement of the number and value thereof of engines, passenger, mail, express, baggage, freight, and other cars or property, used in operating or repairing such railway in this State, and on railways which are parts of lines extending beyond the limits of this State. The return shall show the actual amount of rolling stock in use on the corporation's line in the State during the year for which the return is made. The return shall show the amount of rolling stock, the annual gross earnings of the entire railway, and the proportionate annual gross earnings of the same in this State, as nearly as practicable, and all the property designated hereafter in this section, and such other facts as the State Board of Equalization may in writing require.

"If such officer or officers so designated shall fail to make and furnish said statement, said Board of Equalization shall fix the value and proceed to assess the property of the corporation so failing; the valuation so fixed by them shall be final and conclusive. The said property shall be assessed at its actual value. Assessment shall be made upon the entire railway within the State, and shall include the right of way, roadbed, track, bridges, culverts, and rolling stock. The depots, station grounds, shops, buildings, and gravel beds, shall be assessed by the Assessor of the county where situated as other property. On or before the fifteenth day of May in each year, said Board shall transmit to the County Assessor of each county, through which any railway, operated in more than one county, may run, a statement showing the length of the main track or tracks of such railway within the county, together with a description of the whole of said tracks within the county, including the right of way by metes and bounds, or other description sufficient for identification, and the assessed value per mile of the same, as fixed by a *pro rata* distribution per mile of the assessed value of the whole franchise, roadway, roadbed, rails, and rolling stock of such railway within this State. Said statement shall be entered on the assessment roll of the county. At the first meeting of the Board of Supervisors, after such statement is received by the County Assessor, they shall make and cause to be entered in the proper record book an order stating and declaring the

length of the main track, and the assessed value of such railway lying in each city, town, township, school district, or lesser taxing district in their county through which such railway runs, as fixed by the State Board of Equalization, which shall constitute the taxable value of said property for taxable purposes in such city, town, township, school, road, or other district; and the Clerk of the Board of Supervisors shall transmit a copy of each order of equalization to the City Council or Trustees, or other legislative body of incorporated cities or towns, the Trustees of each school district, and the authorized authorities of other taxation districts through which such railway runs. The taxes on said property for State and county purposes, after collection by the County Collector, shall be paid over to the County Treasurer as other taxes. All such railway property shall be taxable upon said assessment, at the same rates, by the same officers, and for the same purposes as the property of individuals within such counties, cities, towns, townships, school districts, and lesser taxation districts."

[Here read "Assignment of Errors."]

ASSIGNMENT OF ERRORS.

Comes the said County of San Bernardino, and says that in the said record and proceedings there is manifest error in this—to wit: that by the record aforesaid it appears that said judgment was given for said defendant, and against said plaintiff, whereas by the law of the land it ought to have been given for the said plaintiff and against said defendant.

That the Circuit Court erred in deciding that the penalties, interest, and counsel fees were not due to the plaintiff from the defendant.

That the said Circuit Court erred in deciding that in the assessment of the property in question, the said defendant in error was by the said State denied the equal protection of the laws.

That the said Circuit Court erred in deciding that in the making of said assessment, the said defendant in error was by the said State deprived of its property, without due process of law. And the said plaintiff prays that the judgment aforesaid may be reversed and annulled.

law, and may raise the Federal issues in this case. The very

recent case decided by the United States Supreme Court known as the *Kentucky Tax Cases* determines these propositions as stated above.

There remains undetermined this question: Does the system of taxation in California deny to the defendant the equal protection of the law, by refusing to the defendant the deduction from the value of its taxable property the amount of the mortgages upon it, when all other persons are allowed such deduction?

We contend, first, it does not. We contend, secondly, that if an unlawful discrimination is made in the constitutional provision for taxing railroad corporations, the defendant must show that he is injured by it. Thirdly, we deny that defendant is injured, and contend that the record shows that defendant is bound by its own undertaking to pay just what the law complained of imposes upon it. Fourthly, that the Constitution of 1879 being prospective, and not retroactive, in no way relates to or affects the mortgage exhibited in the record, executed in 1875, nor could possibly in any way affect it without impairing the obligation of contracts; nor is it possible that in any future contracts of mortgage the discrimination complained of can exist in virtue of the law, because under the Constitution it is lawful for the mortgagor, if a railroad corporation, by a condition that the mortgagee shall pay his proportion of the tax, to protect itself. As to the first three propositions, D. M. Delmas, Esq., as counsel for the plaintiff, argued in the Circuit Court in cases involving the same questions as are presented by this record, as follows:

"I approach the last and most important proposition in this case. I turn to that clause of the Fourteenth Amendment which says: 'Nor shall any State deny to any person within its jurisdiction the equal protection of the law.' The defendant corporations say that they are persons within the jurisdiction of the State of California; that they are entitled to be protected by law equally with all other persons, and that the Constitution of the State denies this protection. The mere statement of the claim shows its gravity and reveals its magnitude. Yet, upon examination, I feel confident the claim will appear unfounded.

"The Constitution of this State, in its system of taxation, says that a mortgage shall be deemed and treated as an interest in the property affected thereby, and shall be assessed

and taxed to the owner thereof, except as to railroad and other quasi-public corporations. This provision, it is claimed, violates the Fourteenth Amendment, because it makes an injurious discrimination against railroads and other quasi-public corporations, and thereby deprives them of the equal protection of the law.

"The imperfections and sins of the Constitution are stated in his Honor Justice Field's opinion, at page 22, where it is said: 'If we now look at the scheme of taxation prescribed by the Constitution of California for the property of railroad companies, we shall perceive a flagrant departure from the rule of equality and uniformity so essential to equality in the distribution of the burdens of government.' Mr. Sanderson, in his brief filed in the Supreme Court of the United States, says: 'The Constitution of California was changed in 1879, among other reasons, for the openly avowed purpose, in the popular language of the day, of 'cinching railroad and other quasi-public corporations,' and should the judgment in this case be reversed their purpose will have been accomplished.' The more rhetorical indictment formulated by Mr. Roscoe Conkling against our Constitution was in these words: 'Be this as it may, for enterprise and ingenuity, for rude yet cunning severity, for irreverence of law, for disdain of obstacles, appearances, and traditions, and for contempt of vested rights, it seems safe to say that, carried away by excitement, California has in form sanctioned provisions without parallel in the Constitutions of North American States, made by white men for white men, in our time.'

"These are the strictures upon the Constitution of the State in which we live. These are the aspersions cast upon our mode of dealing with railroad and other quasi-public corporations. We are charged with subjecting them to a system of laws at once unjust, oppressive, and tyrannical. Permit me, then, at the outset, to refute these accusations. The task of showing that they are unmerited will, I think, be neither long nor difficult. A brief examination into the history of the Constitution and a rapid review of facts of public notoriety in the State, will demonstrate, beyond all question, that the provision of the State Constitution under consideration had no such purpose in view, and can have, and has, no such effect as the defendants allege.

"The history of the State shows that, for some years before the Constitution of 1879, there had been a long and bitter struggle between two parties—one favoring the taxation of mortgages and the other opposing it. A line of decisions will be found in the reports of the Supreme Court of the State, declaring that mortgages were property and must be taxed. It would, perhaps, be more accurate to say, declaring that debts secured by mortgage should be taxed. These decisions gave rise to great and prolonged opposition on the part of the large banking institutions, savings banks especially, of the City of San Francisco. Strenuous, continued, and sys-

tematic efforts were made to overthrow these adjudications. After many vain and fruitless attempts, victory at last crowned the assailants, and the decisions were overthrown. By later adjudications of the Supreme Court, it was decided that debts secured by mortgage were not property within the sense of the Constitution as it then stood, and could not, therefore, be taxed. Those familiar with recent events will remember that these last decisions excited in certain quarters much comment and no little indignation. These feelings constituted one of the chief elements which led to the calling of the Convention to frame a new Constitution. It was one of the well understood and settled purposes of the people and their delegates to amend the organic law so as to make mortgages, or debts secured by mortgages, if you please, the objects of taxation. Very early during the sittings of the Convention, an article was reported by the Committee on Taxation looking toward the realization of these purposes. This article declared that credits and mortgages were property, and should be taxed as such.

"At this point a difficulty arose. The earlier decisions of the Courts which declared that debts secured by mortgage, or the mortgage itself, if you please, might be taxed, held, at the same time, that the land subject to mortgage should, nevertheless, be assessed at its full value. That this was sanctioning an unjust and impolitic system seems indisputable. That it resulted in taxing the same property twice over appears plain. It was so deemed by the Convention. Whilst, therefore, they gratified the public wish by providing that mortgages should be taxed, they aimed so to frame the provision as that no unwise and impolitic result should follow. They determined, consequently, that the value of the mortgage should be assessed by itself, and should be treated as an interest in the land, and that the residuary interest, as it were, in the land, should be assessed to the owner of the fee. In the common, though not strictly accurate, language of the day, they deducted the value of the mortgage from the value of the property.

"Now, when it was attempted to make this provision general and applicable to all kinds of property, it could not fail to strike the thinking and honest minds of the Convention that that scheme could not be applied to railroads without producing most unexpected and disastrous results. What, at that time, was the condition of the great Pacific railroads? What would have been the practical result of a system of taxation assessing mortgages separately to the holders thereof and assessing to the land owner the residuary interest merely, after deducting the value of the mortgage? It was a fact of public notoriety that, at that time, the United States held a mortgage on the Central Pacific Railroad Company for twenty-seven million dollars. There was also another mortgage given to private parties to secure twenty-seven million dollars of what are called first-mortgage bonds. There was,

besides, a mortgage of ten million dollars to private individuals upon its land grant. The Central Pacific Company was, therefore, mortgaged for twice twenty-seven million dollars upon its road and ten million dollars upon its lands, making, in all, sixty-four million dollars. The Southern Pacific Company had a mortgage upon its land grant and railroad of forty-six million dollars. The aggregate of the mortgages on the two companies was one hundred and ten million dollars. The difficulties of making the general provision of the Constitution applicable to the property of these corporations, found in this condition, were apparent and insuperable. The mortgages of the Central Pacific Company covered property in the State and outside of the State. Those of the Southern Pacific Company, besides the railway, depots, grounds, and rolling stock, affected a land grant of eleven million acres of land—a land-grant partly earned and partly unearned, partly patented and partly unpatented, the title to a portion of which only had vested in the company and the rest remained in the Government—a land grant continually shifting in its proportions, increasing on one side by new patents received from the Government, and decreasing on the other side by sales made by the company.

"When the Convention came to face the problem of how these mortgages should be apportioned among the various counties of the State; how they should be deducted from the various parcels of the companies' property; how much of them was to be borne by the main trunk; how much by the branch roads; how much by the depot grounds and yards; how much by outlying lands; when they added to these difficulties the fact that the mortgage of forty-six million dollars covered bonds that might issue in the future, or might, at any time, be redeemed, and that it was impossible for any Assessor to ascertain how many bonds were actually outstanding; when they added the fact that the mortgages upon the Central Pacific Railroad covered property partly in the State and partly out of the State, and that it was extremely difficult, if not impossible, to ascertain what relative proportion of the security was in the State and what out; when they added the fact that one of the mortgages of twenty-seven millions was held by the United States, and was, consequently, beyond the reach of taxation; when, I say, the framers of the Constitution were brought face to face with these obstacles, they readily perceived that the general scheme of taxation could not apply to these railroad companies.

"In seeking a way out of these difficulties, in endeavoring to devise a plan that would at once carry out the wishes of the people as to taxing mortgages, without producing double taxation, and would still be applicable to the immense property of these railroad corporations, the Convention had its attention called to the fact—a fact of public notoriety, spread upon the records of every county in the State—that the mortgages given by these companies contained a covenant that

the mortgagors, themselves, should pay all taxes imposed upon the property mortgaged, and discharge every lien or burden thereon that might have priority of the mortgage. In this covenant was found a ready solution of the difficulty. In the light of its obligations, it was perfectly apparent that the assessing of the mortgage separately to the mortgagee and the residuary interest merely to the mortgagor would, as to the companies, be an idle ceremony. As they were under obligation to pay the whole tax—as well that imposed upon the interest covered by the mortgage as that upon the residuary interest—it could be productive of no conceivable benefit to them to have these two interests assessed separately, and of no conceivable injury to have them assessed in lump. The result, in the end, upon the amount of taxes they should pay, would be precisely the same. In both cases their burden of taxation would be precisely the same. The Convention, therefore, resolved that the property of these corporations should be assessed as a unit, whilst the property of other persons should be assessed in fractions—part to the mortgagor, part to the mortgagee.

"In view of these facts—of this history of the labors of the Convention—I submit to the judgment of any candid or just man whether the Constitution of the State deserves the insults which have been heaped upon it, in the crude vernacular of the attorney from San Francisco or the pompous and tinseled rhetoric of the ex-Senator from New York?

"When these defendants thus revile the organic law of the State, are they not aware that they expose themselves to the charge, not only of unfairness, but of ingratitude as well? Are they not conscious that, in its practical operation, the system which they arraign is highly favorable to them? Are they ignorant that the discrimination against which they exclaim is a discrimination, in practice, beneficial instead of injurious to their interests? Yet, all this is perfectly apparent upon an examination of the law and the facts before us.

"What is it, indeed, that these defendants complain of? They complain of what they term an unjust, injurious, tyrannical discrimination against them. They complain, for that they are not assessed as other persons are assessed. They protest that they have a right to be assessed precisely upon the same plan as others are. They say that, if a private individual has a mortgage upon his land, the residuary interest alone, after deducting the value of the mortgage, is assessed to him, and the mortgage itself is assessed to the mortgagee; and they claim that justice requires that their property should be assessed in the same, and not a different, manner. In fine, they wish to be assessed upon the same plan that you and I are assessed. Grant them their wish. Now, mark the practical operation: The Assessor goes to the railroad office and applies to these corporations the system that is applicable to yourself and me. He proceeds and says to the President of the Southern Pacific Railroad: 'Mr. Crocker, I

want your statement for the purpose of assessment; I am in pursuit of information, and, if it please you, I will first begin with the question: 'Is there a mortgage upon your road? If so, for how much, and to whom?'"

"'Yes, sir,' Mr. Crocker answers, 'there is a mortgage, given to Lloyd Tevis and D. O. Mills, to secure forty-six million dollars of bonds, which are now selling above par in the market."

"'Well,' proceeds the Assessor, 'we will begin with that, if you please. We will assess to Mills and Tevis a mortgage of forty-six millions. But, Mr. Crocker, your road is worth something over and above the mortgage. How much? Shall we say four millions? Well, then, your road is assessed fifty millions—forty-six for the mortgage interest and four for the residuary interest. Your company is now assessed precisely like a private individual, and doubtless you are entirely satisfied.'

"Now, note the result: The day of payment comes. The company pays taxes upon four millions assessed directly to it, and it also pays the taxes upon forty-six millions assessed to Tevis and Mills; for that, by the terms of its mortgage, it has expressly agreed to do. It pays, in all, upon fifty millions. Now, observe, that, under the system made applicable to them by the Constitution, the whole road, taken as a unit—mortgage interest and residuary interest combined—has never been assessed at more than eleven or twelve million dollars—not one fourth of the amount of the mortgage alone.

"In practice, therefore, the system has been productive of positive and incalculable benefit to these companies. And that such would be its operation, they, themselves, doubtless well know. They knew that they might pursuade the State Board of Equalization that their road was only worth eleven millions; but they knew that they would not pursuade them that a mortgage of forty-six millions, securing bonds selling above par, was worth, or should be assessed at less than forty-six millions. Were they assessed, therefore, as you and I are assessed, they could, by no possibility, escape paying taxes upon forty-six millions. They have, in fact, never been called on to pay upon more than eleven or twelve. Yet, they complain of the system, denounce its discrimination, and revile its authors. This, if not lack of discernment, is base ingratitude.

"A little reflection bestowed upon the facts which I have detailed and the practical results which I have pointed out, will dispel all ideas of any desire on the part of the Constitutional Convention to be unjust to railroad companies. Nay, that reflection might well excite the surmise that this scheme was framed by the friends, not the enemies, of those companies—a surmise which will in no way be weakened when, upon turning to the debates, we shall find that the scheme was drawn up and introduced in the Convention by a gentleman who, having frequently acted as the counsel of these

companies, may, not unreasonably, be assumed not to have been violently hostile to their interests.

"Having now, according to my measure, vindicated our Constitution from unjust aspersions, I come to consider the Fourteenth Amendment itself. It is said that the word 'persons,' as used in the last clause of the Fourteenth Amendment, includes corporations as well as human beings. And it is claimed that when the law of the land, the highest law, the Constitution of the United States, says that no State shall deny to any person within its jurisdiction the equal protection of the laws, it means that the laws must make no discrimination between artificial and natural persons, and must operate equally upon both—before the law they are both equal. These propositions I wish to be understood distinctly to deny.

"In the first place, what is the meaning of the word 'equal' in the Fourteenth Amendment? The best definition that I have yet read is found in a production which I have already frequently referred to—the argument of the learned counsel for the defense, made in the Supreme Court of the United States. Mr. Sanderson there says: 'I believe that the clause in relation to equal protection means the same thing as the plain and simple yet sublime words found in our Declaration of Independence, 'all men are created equal.' Not equal in physical or mental power, not equal in fortune or social position, but equal before the law.' Senator Edmunds, speaking on the same occasion of this amendment, said that it was a 'broad and catholic provision for universal security, resting upon citizenship as it regarded political rights, and resting upon humanity as it regarded private rights.' His Honor Justice Field, in the course of this trial, well remarked that 'by that provision the dream of statesmen and philanthropists has been realized. All men have been placed upon the same footing of equality before the law.'

"To all these noble and lofty sentiments I beg leave to give my humble concurrence. To these, as statements of the broad meaning and generous scope of the Fourteenth Amendment, I yield my fullest assent. Neither temperament nor reflection impel me to join that school which would dwarf the proportions of this provision by restricting its benefits to a particular class or a particular race. No. The law is as broad as humanity. Wherever man is found in these United States, whatever may be his race or condition, whether he be white, or black, or copper-colored, or master, or freedman, he may take shelter under this great law as under a shield, against oppression in any form, injustice in any shape. It is a protection to all men, because they are men, members of the same family, children of the same Creator. It is the authoritative repetition of a sentiment uttered more than one hundred years ago by the great philosopher of Geneva, echoed in this country by the authors of the Declaration of the Thirteen Colonies, caught up and pro-

claimed through the world by the Revolution of France in the words: 'Equality and Fraternity.' It may be the first dawn of the realization of the dream of the poet, the philanthropist and the philosopher, that the day will come when, not only in this nation but in all nations, not only in this land but in all lands, there shall be established a republic, one and universal, under whose laws man may claim from man, in all climes and in all countries, the same rights, the same protection, the same measure of justice.

"What, then, must the State do in order to obey this great commandment that all men shall be equal—shall receive equal protection? The State must see to it that no man, no class, no order of men, shall be granted privileges, immunities, distinctions, which are denied to others; that no hereditary rank of superiority or nobility shall be secured to one which is not vouchsafed to all; that no badge of invidious discrimination or humiliating inferiority shall be affixed upon any, the humblest member of the community. The State must see to it that the avenues of life are equally open to all; that whatever pursuit is lawful for one is lawful for all; that whatever hopes, aspirations, ambitions, are licit for the most exalted shall be equally licit for the most humble; that into whatever paths leading to profit, place, or honor one man may venture to tread, all may, upon an equal footing, enter. The State must see to it that it lays its hand with parental justice upon the head of all its children; not in partial kindness upon one and harsh anger upon another. To attain and accomplish these great ends, in all the States, is the object of the Fourteenth Amendment.

"Behold, now, the new reading which these defendants give to this clause which, but a moment ago, they informed us has humanity for its basis and means the same thing as the declaration that all men are equal. They would read it: 'All men and all corporations are equal.' Thus, the creature of man's handicraft—the bodiless, soulless, conventional creation of the State—is, by construction, raised to a plane of equality with the creature of God. Thus, is the impious thought formulated that the State has power to form a being—an impalpable, imaginary, mythical being—which, in the order of nature, shall take its rank side by side with the beings emanating from the Creator.

"That reading I deny. I deny the existence of any such power in the State. I admit, of course, that the State may, as the phrase goes, create a corporation. But I deny that the State can endow this, its creature, with the attributes of a human being. And I deny that there exists any power anywhere, in the Federal Government or elsewhere, to compel the State to confer these attributes. As the Creator may, in the omnipotent act of creation, impose upon his creatures the rules and conditions of their existence, so, the State, when it assumes, for the time being, the functions of creator, may impose upon its creatures—corporations—the rules and con-

ditions of their existence. The will of the State is as supreme in one as the will of God in the other. I admit that, as between human beings, the State can make no invidious discrimination; but I deny that, as between the creatures of the State and the creatures of God, the State may not make such discriminations as it pleases. Thus, a wide gulf opens between myself and my learned adversaries and between myself and the decisions of your Honors on the former hearing of this cause.

"Equality between persons is incompatible with the idea that special rights, privileges, and immunities may be granted to some and denied to others. It is as effectually destroyed by partiality in bestowing favors as by partiality in imposing burdens. Is not this obvious truth, in itself, sufficient proof that men and corporations are not equals? The very purpose of creating a corporation is to make it, in many respects, different from human beings and superior to them. The very aim of the State, in the act of creation, is to endow its own creatures with rights, privileges, and immunities which are not possessed by men. This is the very object of forming corporations. If they are to be nothing more than men, it is idle to form them. Not to deal in generalities, let us take as an illustration the corporations before us, and see in what way the State has in them destroyed all possible claim of equality between them and individuals.

"As his Honor, Justice Field, well remarked, in his opinion in the Slaughter-house cases, there are certain duties which are imposed upon the State as sovereign, and, among them, that of opening roads and highways, and providing means of intercommunication between different points of the State. The State may itself directly discharge these duties, or it may delegate their performance to creatures of its own creation. It would have been competent for the State of California to build the railroad from San Francisco to the Colorado River. Instead of doing so directly, the State has created a corporation called the Southern Pacific Railroad, upon which it has cast the duty of building that road, and to which, in order that the duty might be effectually performed, it has delegated a portion of its sovereign attributes.

"True, a man might, unaided by the State, have built this road. It is within the competency of any human being to lay iron upon the ground and roll cars upon it. But mark the immeasurable inferiority under which the individual would have labored. Mark the incalculable superiority of the corporation over the human being. Mark the discriminating favors of the State bestowed upon one, denied to the other. The State has granted to the corporation the right of eminent domain, the sovereign power to take property against the will of its owner. The State has denied this power to the individual. The State has granted to the corporation the right to construct its roads across, along, or upon streams, water-courses, roadsteads, bays, navigable streams, streets,

avenues, and highways, and across railways, canals, ditches, and flumes. The State has denied this right to the individual. The State has granted to the corporation the right, free of charge, to construct its road on and over all the lands of the State, and to take and occupy on such lands all grounds necessary for depots, stations, and other buildings. The State has denied this right to the individual. The State has granted to the corporation legislative power to make and enforce rules which shall have the force of law in the regulation and management of its business. The State has denied this power to the individual. The State has granted, and has authorized cities and counties to grant, to the corporation vast sums of money in the shape of aids and subsidies. The State has denied such aids and subsidies to the individual. In fine, the State has granted to the corporation the right of perpetual succession—the power to defy death itself and to prolong its existence beyond the grave.

"These are some of the rights, privileges, immunities, franchises, which the State has granted to the corporation, to these defendants, which it has not granted to you, which it has not granted to me, which it has not granted to any individual human being within its borders.

"In fine, the State has granted to these defendants such special rights, privileges, immunities, franchises; it has endowed them with such transcendent and sovereign attributes; it has exalted them to such a height of universal and imperial power—rights, privileges, immunities, franchises, attributes, power not enjoyed by individual men—that, to-day, they own more than one tenth of the lands of this broad commonwealth, and possess more than one fifth of all its property; they hold in their hands the fate of its manufactures, agriculture, and commerce; they sit as despotic arbiters of its destiny; they have grown so great, they have waxed so arrogant, that their creator—the State—grovels at the feet of these, its creatures, timid, shrinking, helpless, an object at once of their rapacity and of their contempt.

"And yet we are told that these creatures—nay, these masters—of the State, by virtue of the Fourteenth Amendment, are the equals, and not more than the equals, of the humblest human being in the land.

"And now, I ask, if the State may thus load a corporation with favors, may it not subject it to corresponding burdens? If it may thus exalt its creature with attributes of sovereignty, may it not exact something in return? If it may grant it more than to individuals, may it not demand from it more than from individuals? Is the corporation the creature of the State, to take but not to give? I should have supposed that those questions admitted of but one answer, had not my learned adversaries, had not your Honors, already given them a different answer.

"We are told, and your Honors have decided, that, in the matter of burdens, the corporation must be dealt with pre-

cisely as an individual under the same circumstances; that they are entitled to the equal protection of the law, and their burdens must be equal. This was said, it is true, with reference to what has been called the taxation of the property of the defendant; but the proposition, if true at all, is true to the general extent that I have stated. I deny the truth of the proposition to any extent.

"The same Constitution which protects the property of man, protects him also in the pursuit of whatever avocation it is lawful to follow. The right to hold property is not more sacred than the right to labor. If, in the protection of their property by law, all men are equal, equal also are they in their right to labor. If the State may not impose upon the property of one person a burden which it does not impose upon the property of another similarly circumstanced, so the State may not impose upon one person following a given pursuit a burden which it does not impose upon another following the same pursuit. The Fourteenth Amendment clearly forbids both. If, therefore, under that amendment, corporations are persons entitled to the equal protection of the laws with human beings, it follows that, in the pursuits in which it is lawful for them to engage in common with human beings, they cannot be made to bear a tax from which human beings are exempt. Equality demands that you shall not lay a tax for the right to carry on his business upon baker A, that you do not demand from baker B. If corporations are within the same rule of equality, then must you not exact from baker C, a corporation, a tax which you do not collect from baker B, an individual.

"But, this would be at variance with conceded principles and the practice of every State in the Union. In Massachusetts, the pursuit of insuring is free to all persons. Yet, that State—not lacking assuredly in zeal for human and equal rights—says, by its laws: 'Any person in the State can follow the business of insurance. We impose no burden on human beings who follow that pursuit. They may do so without charge. But, if a corporation engages in the business of insurance we demand from it a tax of one per cent on the amount of premiums received by it.' In Connecticut it is lawful for any person to receive savings on deposit. No tax is imposed on the individual banker; but a tax of three fourths of one per cent is imposed upon all deposits received by a corporation doing the business of a savings bank.

"Instances might be multiplied; but I pause to ask: Why this discrimination? Upon what ground can it be justified? The individual has the right to carry on the business of insurance and of banking; but so has the corporation. The right is the same. The business is the same. If the corporation is the equal of the individual; if it is entitled to an equal protection from the law; if it may protest against discrimination, how do you justify the imposition of the tax

upon the corporation which is not imposed upon the individual?

"Under the principles here contended for, it cannot be justified. Those principles are stated by his Honor Justice Field in this opinion that I have so often referred to, at page 39: 'As no discriminating and partial legislation, imposing unequal burdens on the property of individuals, would be valid under the Fourteenth Amendment, so no legislation imposing such unequal burdens upon the property of corporations can be maintained.' Apply the principle to the cases that I have been adverting to. Paraphase it to suit their circumstances: 'As no discriminating and partial legislation imposing unequal burdens upon the pursuits of individuals, would be valid under the Fourteenth Amendment, so, no legislation imposing such unequal burdens upon the same pursuits carried on by corporations can be maintained.' As I have already stated, the right to pursue a lawful vocation is just as sacred as the right to own land or to own chattels.

"No one denies—it has been expressly conceded here—that the States of Massachusetts and of Connecticut may constitutionally impose upon insurance and savings bank corporations, the tax which I have just described. Why is it so conceded? The reason is obvious. The power of taxation is sovereign and unlimited. It may be exerted upon any person within the jurisdiction of the State—upon human beings, who are persons, and upon corporations, which are also persons. But, there is no constitutional obligation to exert it in the same manner upon a corporation as upon an individual; because, a corporation, though a person, is not the same kind of person as an individual. The Fourteenth Amendment does not require, and could not enforce, equality between these different beings, which, in their very essence, belong to a different order of creation.

"But, while it is not denied that, in the imposition of burdens upon persons following certain pursuits, the State may make a very broad discrimination between the same pursuit when followed by a corporation and when followed by an individual, it is declared that, in the imposition of burdens upon persons owning property, no discrimination can be made between the corporation and the individual, when the property possessed by both is the same in kind. The reason upon which this distinction is sought to be based is, that the property of the corporation is, in reality, the property of the individuals who compose it; that these individuals do not lose their right of individuals to the equal protection of their property by law because they own it under the name of a corporation; and that a discrimination against the property of corporations is, in truth, a discrimination against the property of individuals.

"Says his Honor Justice Field, page 34: 'It would be a most singular result, if a constitutional provision, intended

for the protection of every person against partial and discriminating legislation by the States, should cease to exert such protection the moment the person becomes a member of a corporation.' Singular though it may appear, I humbly submit that the result does, beyond doubt, follow. The citizen of Massachusetts who pursues the business of insurance has no tax imposed upon him by reason of his pursuing that business. He, and ten others similarly situated, now aggregate themselves into a corporation, and the corporation now carries on the self-same business of insuring. A tax is now imposed—legitimately imposed—upon the corporation, by reason of its following that business. Here, I ask, in the language of his Honor: 'Is it not singular that the provision of the Federal Constitution, intended for the protection of every person against partial and discriminating legislation in the carrying on of the legitimate business of insuring, should cease to exert such protection the moment the person becomes a member of an insurance corporation?' I answer: No, it is not singular. It is a result which everybody assents to. For the same reason I say: It is not at all singular that the individual who is engaged in holding, managing, and owning property, should be entitled to a protection from the law equal to that afforded to all other individuals similarly engaged, and, yet, should lose the right to claim a protection equal to that accorded to individuals, when his identity is merged and lost in a corporation which is not an individual.

"The assumption that the rights and liabilities of a corporation are but the sum of the rights and liabilities of the members who compose it, and must be dealt with accordingly, is the basis of your Honors' decisions against which I am contending. That assumption I deny. I deny that, because corporators, in their individual capacity, each possess a given right; that right becomes, by aggregation, the right of the corporation of which they are members. The corporation possesses such rights, powers, and immunities only as the State chooses to confer. The corporators can give no more. The citizen of New York may, if he pleases, come into the State of California, and there carry on the business of banking. He is entitled to all the privileges and immunities of citizens of California. But, ten citizens of New York, aggregated into a banking corporation, may not, if the State sees fit to forbid it, enter within our borders. Why? If the rights of the corporation are but the aggregated rights of its members, why shall ingress be denied to the mass, when it cannot be denied to the parts?

"For the same reason I deny the assumption that the rights and liabilities of a corporation, with respect to its property, are but the aggregate of the rights and liabilities, with respect to their property, of the members who compose it. This assumption, when made in a discussion upon taxation, proceeds, I humbly submit, upon erroneous ideas of property and taxation both.

"What is property? It seems to be assumed that things are property; and that, where the things are the same, the property must inevitably be the same. The favorite illustration used here, and laid down as a self-evident truth both by bench and bar, has been this: If A, an individual, owns an acre of land, and B, a corporation, owns the adjoining acre, the property is the same. This assumption is a palpable error. The land is not property. Abstract it, in your mind, from any relation with persons, and you cannot conceive the idea of property. Before persons came, there were things, but not property. Property springs up from a relation of persons to things, and, indeed, consists in that relation. Nowhere have I found this idea better expressed than in the argument made in these cases by Mr. Edmunds. Says the learned Senator (page 14 of printed copy): 'Therefore, I say, it is impossible to conceive of the idea of property, without you conceive in the same moment of time, and inseparable from it, the idea of some being we recognize as existing in this world, either natural or artificial, which has dominion over it. That is all there is in property.' On the same subject it has been well stated by Jeremy Bentham: 'Property and law are born and must die together. Before the laws, there was no property; take away the laws, all property ceases.' Property, therefore, may be defined as the dominion which persons, with the sanction of law, exert over things.

"Bearing this definition in mind, it is not difficult to detect the fallacy there is in saying that because A, an individual, owns an acre of land, and B, a corporation, owns the adjoining acre, therefore the property of the individual and the property of the corporation is the same. To determine the nature and quality of the property of both by a mere inspection of the physical object, is to take a very superficial and unphilosophical view of the question. To ascertain whether the property is the same, we must know what are the relations, sanctioned by law, of each of the persons to the subject-matter, and determine how far they are similar or dissimilar. In these relations, thus sanctioned, consists the property of each; and, though the thing be the same, the relations may not be the same.

"Now, the relations of corporations and of persons to things may be, and generally are, widely different in their origin, quality, and extent. The right of man to acquire dominion over things has its origin in the very laws of his being. His first impulse and his primal obligation is to preserve his existence. He seizes upon things in order that, by their use or consumption, he may live. All the acquisitions and accumulations of man, from those of the rude savage who subsists from day to day on the fruits of the chase to the vast hoards of a Rothschild or a Vanderbilt, have this scope—no more. Laws sanction and regulate, but do not create, the dominion which man thus acquires. Corporations, on the other hand, derive their right of acquiring dominion over

things, not from nature, but from the State, and exert it in absolute subjection to the will of their creator.

"Again: The law in this country imposes no limitations whatever upon the pursuits or acquisitions of individuals. They may turn their steps into whatever paths they please; they may pursue fortune under whatever shape she assumes; they may accumulate in money, in chattels, in lands, to an unlimited extent. The finiteness of their nature is their only bound. Corporations, on the other hand, are restricted in their operations within certain well defined and narrow limits; they must follow certain paths, and may not enter into others; the character and extent of their acquisitions are prescribed; they may not go beyond. The law fixes no term to the duration of the dominion of man over the things which are his. He holds it during his life, and may contemplate its transmission by indefinite hereditary succession to his remotest posterity. The time during which a corporation may hold dominion over things is limited by its creator. The law determines that it shall cease in ten, or twenty, or fifty years.

"But, the chief and characteristic distinction between the property of corporations and of persons is found in the special manner in which the corporation may use and exert its dominion over things, wholly different from that of individuals. Take a simple illustration: Here are two cars, built upon the ordinary model of passenger coaches. One belongs to you, the other to the Central Pacific Railroad Company. This Court says: The cars are the same, therefore the property is the same. But, mark how different from yours is the relation of that corporation to its car. The State has granted to the corporation a special dominion and prerogative right in the manner of using its property that you have not. In the hands of this corporation this car becomes one of the means of enjoying the exalted privileges and exercising the vast powers which the State has granted. It becomes an instrument for the collection of tolls. It may run over a road which the State, by a delegation of its sovereign attributes, has given the corporation a right to build, and which may span a continent. All these elements constitute the special relation of the corporation to that car—its property. All these relations constitute the chief distinction between the property of the corporation and the property of the individual in things intrinsically the same. This it is that gives to corporate property a characteristic and a value which the same things would not have in the hands of individuals. The remarks of a great Judge, spoken on another occasion—Justice Miller, in the State Railroad Tax Cases—better express my thoughts: 'It is because, in the case of the railroad, there is attached to all this property, and goes with it, a privilege, a right to use it through the whole extent of the richest counties of Illinois, in transporting persons and property, in a manner which adds immensely to its value

when considered as so much iron, so much land, and so much personal property. By virtue of this privilege or franchise, this is all aggregated into a unit, well adapted to make money by its use in that way, with chartered right to use it for that purpose.'

"There exists, therefore, in the relation of a corporation to physical objects, an element which does not exist in the case of individuals. There is found in the legal dominion of a corporation over things—which constitutes property—a feature which is absent in the dominion of individuals. This element, this feature, is the right and the power to use things corporately.

"Therefore, I say it is a palpable error to assert that, because the physical object subjected to the control of the individual and of the corporation is the same, consequently the property of both is the same. Therefore, I say further, that the property of the corporation is not made up of the property of the members who compose it. Neither as individuals nor as an aggregation of individuals, do they hold the relation to things which the State has enabled its creature, the corporation, to hold.

"I have said, in the next place, that the doctrine against which I contend is based upon a disregard of the fundamental principles of taxation. Permit me to develop that idea. The illustration made use of by your Honors, throughout the course of the discussion, has been that if A, an individual, owns a farm, and B, a corporation, owns, alongside of it, a farm, similar in extent, location, and productiveness, and the State taxes the farm of B five times what it taxes the farm of A, there is here an injustice too gross to be defended. To use the language of his Honor Justice Field, page 23 of the opinion: 'There is here a discrimination too palpable and gross to be questioned. * * * Nothing can be clearer than that the rule of equality and uniformity is thus entirely disregarded.' When, upon the trial of this cause, I stated to the Court that, in my opinion, the tax could be legally so imposed, I was informed, from the Bench, that few persons, with correct notions of justice, would so hold. Reflection has but confirmed my ideas and reason has convinced me that the opposite contention is based upon a misconception of the principles of taxation.

"What are taxes? They are contributions made by the people for the support of their government. Or, if you please, they are burdens, imposed by the people upon themselves, in order to receive from organized government the protection of their rights of person, liberty, and property. To pay this tax, to bear this burden, is the duty and obligation of every person who receives the benefit of the government. How these contributions shall be measured, by what standard these burdens shall be apportioned among the persons which compose the State, is a matter left to the discretion of the sovereign State itself. The State may demand them from

every member of the community equally. It may demand them from those who have large incomes, to the exemption of those who have but the necessaries of life. It may demand them from those who follow particular pursuits, to the exclusion of all others. It may demand them from corporations, and not from individuals. It may demand them from those who own realty, and not from those who own but chattels. In all these matters the will of the State is absolute.

"The standard by which the burden shall be measured is equally within the uncontrolled determination of the sovereign. It may demand from all persons having an income of $5,000 a contribution of one per cent of their income, and from all persons having an income of $50,000 a contribution of ten per cent of their income. It may demand from a banking corporation a contribution of one per cent of its deposits. It may demand from all owners of land a contribution of two per cent of the value of their lands. In all these cases the money, the deposits, the lands, are resorted to merely as standards to determine the quantity of the contribution to be demanded from the person. It is incorrect, though common, to say that the income is taxed, the deposits are taxed, the land is taxed. Not so. The person is taxed. The income, the deposits, the land, but furnish the means of ascertaining how much he shall be taxed.

"A very correct definition of taxes is given by Burroughs on Taxation, § 9, where it is said: 'The tax is a contribution required of its citizens by the State, and, when it is measured, as to its amount, by the value or the productiveness of the property, it is still a tax on the person, and there is a personal liability of the person assessed with the tax. The individual and not his property pays the tax. The property is resorted to for the purpose of ascertaining the amount of the tax with which the owner must be charged. The tax is imposed upon the person of the owner on account of his ownership of the property.'

"The foundation of taxation, and that which makes it just, is that, in return for his contribution, the person receives a corresponding protection from the State in the enjoyment of his rights. In exchange for his taxes, the capitalist demands from the State security in the enjoyment of his income; the bank, protection in the management of its funds; the land owner, safety in the possession of his land. In determining the amount of contribution to be required from individuals by the State, the State may, therefore, be guided by two considerations—the character and extent of rights which the person enjoys, and the character and extent of protection afforded him.

"Go back, now, to the illustration given of A, an individual, owning a farm, and B, a corporation, owning another alongside. What is there so shockingly unjust in the State's saying to A: 'You are a farmer. Your occupation is simply raising and disposing of a few bushels of cereals from this land. You

have possession of this spot by virtue of a natural right. You have received with it no special privileges, different from those of your fellow men. The State has granted you nothing. The protection you demand from it, in your circumscribed sphere, is meager. In view of all this, we declare that one per cent of the value of your farm will be your just contribution—a fair return for all you get from the State.'

"What is there so shockingly unjust in the State's turning to the corporation and saying to it: 'You are the creature of the State. You owe your very being to the State. The right by which you hold this land is not a natural right, but one derived from the State. We have endowed you with immunities, franchises, powers, which your neighbor does not have. We have permitted you to acquire this spot as the means of exercising and making profit out of these immunities, franchises, powers. This land, considered in connection with your other property, may become the basis of vast accumulations, by the exercise of corporate faculties. Used in connection with your railroad, it may become a warehouse or a depot. You have acquired it and hold it by virtue of the right of eminent domain, a sovereign right which we have delegated to you. When we compare this with your neighbor's land, we find that your dominion over it is different, the manner in which you may use it is different, the operations to which it is subservient are different, the privileges, powers, and franchises connected with it, and which make it valuable, are different. The character and nature of your rights, the character and nature of the State's protection to you, are different from those enjoyed by farmer A, and, therefore, we demand from you, in return, five times more than we expect from him—we demand a contribution of five per cent of the value of this land.'

"Every right, every power, every faculty which a corporation possesses it derives from the State. These constitute its franchises. The right to hold, use, and manage land corporately is a franchise. The individual pays the State for the protection afforded to rights, powers, faculties, derived from nature. The corporation pays for the protection of rights, powers, faculties—franchises—derived from the State.

"For this reason is it that every contribution demanded by the State from a corporation in return for the protection of its rights, powers, faculties—by whatever standard the contribution may be measured—is necessarily a franchise tax. In *Society for Savings* v. *Coit* and *Provident Institution* v. *Massachusetts*, in the 6th of Wallace, it is held that a tax collected from savings' bank corporations amounting to a given percentage of their deposits is a franchise tax. Why? Because, in the case of a corporation, to receive deposits is to exercise a franchise. Every dollar received and held by it is received and held by no other right than a franchise; and, said the Court, the tax is determined by 'the extent to which they have exercised the privileges granted by their charter.'

"Does any one see any difference between this tax and that levied upon any other corporation? Does the fact that, in this case, it is money that is received, and in others, it may be chattels or land, make any difference? None whatever. Corporation A is a savings bank, and has a franchise to receive on deposit, hold, and use coin. Corporation B is a railroad, and has a franchise to receive, hold, and use land, ties, rails, locomotives, cars. Every coin that corporation A receives, holds, and uses, it receives, holds, and uses in the exercise of a franchise. Every rood of land, every tie, rail, locomotive, car, which corporation B receives, holds, and uses, it receives, holds, and uses in the exercise of a franchise. A contribution demanded by the State from A of one per cent of the value of the coin it has received for the fiscal year is a franchise tax, because it is a tax upon the 'extent to which it has exercised the privileges granted by its charter.' A contribution demanded by the State from B of one per cent of the value of the land, ties, rails, locomotives, and cars it has received for the fiscal year is a franchise tax, because it is a tax upon the 'extent to which it has exercised the privileges granted by its charter.' Your Honors may draw a distinction between the two cases. You may see in one and not in the other a franchise tax. I cannot.

"If these principles are incorrect, the revenue system of nearly every State in the Union is wrong. I might cite numberless cases as illustrations. It were tedious, if your Honors please, to go through them all. I will only refer your Honors to a very interesting decision but just rendered by the Supreme Court of Maine. I allude to the case of *The State of Maine* v. *The Maine Central Railroad Company*, found in 72 Me., page 376. This case was decided on the eighth of February, 1883. It was an action of debt, under the statute of 1880, to recover a tax assessed by the Governor and Council against the defendant corporation for the year 1880. The report says: 'The defendant denies the legality of said tax on the sole ground that the said Act is in contravention of the Constitution of the State. If the Act is constitutional, judgment is to be rendered for the State for the sum of eleven thousand dollars, with interest from July 1, 1880; otherwise judgment for defendants.'

"Now observe, if your Honors please, first, the language of the statute under which the tax was laid. 'By the Act under consideration,' says the report, 'the Governor and Council are to appraise the several railroads in this State, with their franchises, rolling stock, and fixtures, at their cash value, and upon this valuation to levy a tax of one per centum, so as to make said tax equal, as near as may be, to the taxes of all kinds upon other property, through which said railroad may extend. The appraisal of the property of said railroad companies shall embrace only the roadways, rolling stock, and franchises. The land, buildings, and fix-

tures outside of said roadway shall be taxable in the towns where situated, as other property.'

"Said the Court in its decision: 'The question is whether the tax authorized by the Act of 1880, Chapter 249, entitled 'An Act relating to the taxation of railroads,' is one which it was competent for the Legislature to impose. If it is a tax upon real or personal estate, then it is one which it was not competent for the Legislature to impose; for the Constitution required all taxes upon real and personal estate to be apportioned and assessed equally, according to its just value; and we think it must be conceded that this tax is not so apportioned and assessed. But if it is a franchise tax—that is, a tax imposed upon railroad corporations on account of their powers and privileges—then it is one which it was competent for the Legislature to impose; for the power for the Legislature to impose such a tax is well settled, and is not denied by the defendants. The question, therefore, is whether it must be regarded as a property tax or a franchise tax.'

"'Now,' say the Court, 'it is perfectly well settled that the amount of a franchise tax upon a corporation may be graduated or measured by an appraisal of the whole or any portion of the corporate property, without thereby making it a property tax. Most franchise taxes are so measured. Possessing the power to impose a franchise tax to any amount it deems proper, the Legislature may measure the amount by any standard it pleases. It may fix the amount at a speciedfi sum, as a poll tax is imposed upon an individual, and without regard to the amount of business the corporation does, or the amount of property it possesses, or it may graduate and measure the amount by an appraisal of the whole or any portion of its property, or by the amount of its business.'

"Therefore, by the unanimous voice of the Court, the tax of one per cent imposed upon railroad corporations in Maine, measured by the extent of the value of the property acquired by the exercise of their corporate powers, was held to be a franchise tax and constitutional, although the language of their Constitution, like ours, required that all property should be assessed according to its value. They held that that means property which is held by a natural right. But the moment that you infuse into that property a right derived from the State to use it in a special manner contradistinguished from the right which individuals have, that moment you weld into the property a new element, a franchise, which the State has a right to tax. It may tax it in gross; it may tax it according to the earnings that you make out of it; or it may tax it according to the value of the tangible property to which it attaches—the property that you have acquired, hold, and use, by virtue of the franchise.

"In the case that I have already referred to, of the State Railroad Tax Cases, the Constitution of Illinois enacted that, as to corporations, it would be legitimate for the Legislature

to provide such a mode of assessment and tax upon corporations owning or using franchises and privileges as it should from time to time direct by general law, uniform as to the class upon which it operates. Acting in pursuance of the Constitution, the Legislature passed and adopted a special system for taxing railroads, their franchises, roadbed, and rolling stock. 'Now,' said the Supreme Court of the United States, at page 611, 'as to Section 1, we need not inquire very closely whether the mode adopted by the statute and the rules of the Board of Equalization produces a valuation for railroad companies different from that of individuals, though, as we have already said, it does not appear to us to produce any inequality to the prejudice of the companies. But we need not pursue that inquiry very closely, because the latter part of the section in express terms authorizes the Legislature to 'tax persons and corporations owning or using franchises in such manner as it shall from time to time direct by general law;' and the only restriction on the power applied to this class is, that it shall be 'uniform as to the class upon which it operates.' There can be no doubt that all the classes named in this clause * * * are taken out of the general rule of uniformity prescribed by the first clause, and the only limitation as to them is that of uniformity as to the class upon which the law shall operate; that is, innkeepers may be taxed by one, ferries by another, railroads by another, provided that the rule as to innkeepers be uniform as to all innkeepers, the rule as to ferries uniform as to all ferries, and the rule as to railroad companies be uniform as to all railroad companies. As we have seen no evidence that the rule by which railroad property is taxed is not uniform in its action on all the railroad companies of Illinois, we can perceive no opposition to the Constitution of the State in that rule.'

"There was a State Constitution; there were laws passed in pursuance of it, that did take railroad companies and the property of railroad companies out of the general class, and did bring them under a system of taxation which might subject them to a special burden not imposed upon the property of their neighbors. The Supreme Court of the United States said that it was unnecessary to inquire into that, because it was authorized by the very language of the Constitution; and then, further on, when the statute was objected to as conflicting with the Federal Constitution, they said: 'The validity of the statute is not seriously questioned here on the ground of any conflict with the Constitution of the United States. If any such claim be set up, it is sufficient to say it is without foundation.'

"In consonance, therefore, with the fundamental principles of taxation and property, and supported by the decisions just read and kindred cases, I maintain that, when you tax a corporation, even though you measure the burden by the amount of property which it holds by virtue of a power granted by the State, the tax is really measured by the extent

to which the corporation has exerted its corporate rights. The manner of finding the standard of measurement is immaterial. You may measure the tax according to any standard you please. You may impose the tax in gross. You may measure it by the receipts. You may measure it by the volume and extent of the property which the corporation has acquired. All this is matter of form; not substance. The tax is still a tax imposed on account of the exercise of corporate rights. It is a franchise tax. It is a tax imposed as a return for privileges and powers not possessed by individuals.

"One observation more, in this discussion of the general right of equality of taxation under the Fourteenth Amendment, before I close it. My learned adversaries have striven to show, and your Honors, in the former opinions, have, by elaborate reasoning, established that corporations are persons. Of course they are. I, for one, have, certainly, never doubted it. The argument, however, proves nothing, unless you prove that they are, of necessity, included in the word 'persons' whenever or wherever used. That they are so, no one will contend. When the law says: 'Any person, being of sound mind and of the age of discretion, may make a will,' or 'any person having arrived at the age of majority may marry,' the word 'person,' there, certainly does not include corporations. Again, any State of this Union may, if it pleases, forbid a foreign corporation to enter and do business within its borders. This is undisputed. Yet it is equally undisputed that the same State has no power to say what persons shall and what shall not enter it. So, to prove that corporations are persons, is to prove nothing, for, after all, it remains to decide whether they are persons, within the meaning of the word as determined by the connection in which it is used.

"I have endeavored to show that, in the very nature of things, the Fourteenth Amendment could not have intended, or have accomplished, the result of making corporations the equals of human beings. The same conclusion has been reached by deciding that corporations are not persons within the meaning of the amendment.

"Justice Woods, of the Supreme Court of the United States, delivering the opinion in the case of *The Insurance Company* v. *The City of New Orleans*, in 1 Wood, 85, said:

"'The word 'person' occurs three times in the first section, in the following connections: 'All persons born or naturalized in the United States;' 'nor shall any State deprive any person of life, liberty, or property,' etc.; 'nor shall any State deny to any person within its jurisdiction the equal protection of the laws.' The complainants claim that this last clause applies to corporations—artificial persons.

"Only natural persons can be born or naturalized; only naturalized persons can be deprived of life or liberty; so that it is clear that artificial persons are excluded from the provisions of the first two clauses just quoted. If we adopt

the construction claimed by complainants, we must hold that the word 'person,' where it occurs the third time in this section, has a wider and more comprehensive meaning than in the other clauses of the section where it occurs. This would be a conclusion for which we find no warrant in the rules of interpretation. The plain and evident meaning of the section is that the persons to whom the equal protection of the law is secured, are persons born or naturalized or endowed with life and liberty, and consequently natural and not artificial persons.

"The same decision was made by the Supreme Court of California in the case of *Central Pacific Railroad Company* v. *The State Board of Equalization*, 60 Cal. 35.

"I am aware that these decisions are not binding on this Court. I contend that they are correct on principle. And I conclude generally that, neither in matters of taxation nor in any other, is the State of California bound to treat corporations as if they were human beings. Neither in matters of taxation, nor in any other, is it bound to impose upon them the same burdens only that it imposes upon human beings. Neither in matters of taxation, nor in any other, is it bound to afford them the same protection that it affords human beings. In fine, I reiterate the language which I used during the trial, that it is perfectly competent for the State, without violating the rules of justice or of the Constitution of the United States, to say that it will demand from a corporation a tax of two per cent of the value of its property, and from the individual a tax of only one per cent upon the value of his.

"But, really, if your Honors please, the foregoing discussion is not indispensable. It is only the magnitude and dignity of the case, and the fact that these matters have been discussed in the opinions heretofore delivered by you, which warrant the long trespass that I have made upon your patience. Were this an ordinary case it could be disposed of, it seems to me, upon much narrower grounds. These grounds I now propose to examine.

"Even of those who adhere to the notion that it is the property which is taxed, no one denies, or presumes to deny, that it is perfectly competent for the State to make classes for purposes of taxation. Take an ordinary case of classification: Man is the equal of his fellow-man. He should bear, as a man, no greater burdens than are imposed upon his neighbor. And yet, the State says to the young man in the prime of life: 'You shall bear a capitation tax; you shall pay a poll tax.' It says to the same being, in childhood: 'You need not bear this tax.' And it says to the same, in the decline of life: 'You, also, are exempt.' There is a classification of men, by virtue of what? By a very wise discrimination, a discrimination which a moment's reflection points the wisdom of. So, the State may classify vocations. It can say: tailors shall pay a tax of one hundred dollars per annum if they wish to carry on the business of tailoring, but shoemakers need not.

There is a classification imposed upon pursuits, both of which are perfectly legitimate. So, the State may classify property. It may say that property which it is the policy of the State to encourage the ownership of, shall be classified among exempt property; and property from which great private revenues are derived, or property which it is the policy of the State to discourage the ownership of, shall constitute another class and bear the burdens of taxation. Might not the State of California say, in view of the fact that there is in this State a large area of swamp land and a large area of desert land which it is the policy of the State to encourage the reclamation of: 'We decree, in our sovereign will, that we will encourage that reclamation by exempting those lands from taxation, although we demand a tax from the rest of the property of the State?' Or, might not the State say: 'Swamp lands shall bear only one half of the rate of taxation that arable lands bear. They shall both be valued alike at their actual value, but the swamp lands shall bear only one half of the tax that wheat land bears, and the desert land shall bear only one third of the tax that vineyard land bears?'

"Beyond question, the State, prompted by its own wisdom, guided by its own policy, may make this classification; and no one could deny that it is a lawful exercise of authority, or contend that it thereby contravened the law, which says that all men must be equal, and shall receive the equal protection of the laws.

"The State may also create a distinction even in the same kind of property. Suppose the State should adopt the policy of discouraging an excessive indulgence of luxury, and should say to the citizen who owns only one horse and carriage that he should pay no tax, and to him who owns two horses and a carriage that he should pay one hundred dollars of tax, and to him who owns four horses and two carriages that he should pay one thousand dollars of tax. Such laws are common. Their validity has not been disputed. Or, suppose the State should desire to frown upon the excessive and dangerous accumulation of wealth, could it not say to persons whose income does not exceed five hundred dollars per annum, that they should pay no tax; and to persons whose income exceeds five hundred dollars, but does not exceed five thousand, that they should pay one per cent; and to persons whose income exceeds five thousand dollars, but not fifty thousand, that they should pay two per cent; and to persons whose income exceeds fifty thousand dollars, that they should pay ten per cent. Could not the State say so? Might this not be dictated by a wise policy? At all events, would any man question the exercise of sovereign authority in the making of such laws? The State, within its legitimate sphere of action, is sovereign in matters of taxation; and these instances do not contravene the rule of equality of burden among men. There would be, in each case, a something to classify—a something to distinguish each from

the other. It would not be a mere invidious and arbitrary discrimination.

"The State can classify property when owned and used by a corporation, from the very fact that it is owned and used by a corporation. The very fact that the property is a corporate agency, held by virtue of a franchise granted by the State, is, in itself, an element that enters into the property, and distinguishes it from other property. That feature alone affords a basis for classification. All that is required in classification is, that there shall be no invidious distinction; that there shall be no burdens imposed upon a man, or his property, which he can justly say are imposed upon him from spite, or malice, or ill-will, or because his color differs from that of another man, or because his nationality differs from that of his more favored neighbor. Wherever there is found in the property an element which is not common to other property, that alone may afford a proper basis for classification. It is for the State to determine whether that element is, in itself, sufficient to constitute that basis.

"Now, I say that, as in the property owned and used by a corporation, there are, of necessity, infused and inseparably commingled certain rights and privileges which do not accompany property owned by individuals, the State may say that this property, so interblended with these rights, immunities, franchises, and privileges, shall be classified in one class, and that other property, stripped of these rights, immunities, privileges, and franchises, shall constitute another class. There is no invidious distinction in that. There is a distinction in the nature of things between the right of property in one case and in the other; and the State, in its wisdom, may say whether it shall so classify it.

"Now, if it be conceded, that property held and used corporately, by virtue of a franchise derived from the State, may be classified for purposes of taxation, what is there of difficulty in this case? What remains of this case? What brings us here? The State seeks to recover from these defendants, a corporation, a tax levied upon property which they have acquired and still own and use in the exercise of franchises granted by the State. This is an action brought against a railroad corporation operating a road in more than one county to recover from it a special tax, a special burden, which I shall concede, for the purpose of the argument, is not similarly imposed upon any other kind of property. But, if the State may classify property used by virtue of a franchise into one class, and say that it shall bear a tax of two per cent, while other property bears a tax of but one per cent, what is there left for these defendants to complain of?

"But, it is said the distinction in this case is this: That in the case of property of a private individual—in the case of property of a farmer, for instance—if the farm be mortgaged, the valuation that is taxed to the farmer, to the mortgagor, is the residuary interest after you have subtracted from the

land the value of the mortgage; but in the case of a railroad company, you assess the whole road and make no deduction for the mortgage. In this, it is claimed, there is an unjust, invidious discrimination.

"I have endeavored to show, in the course of this argument, the policy and the wisdom which may have dictated these provisions of the Constitution. But, independent of that, if we admit that railroad property, property actually in use by the railroad, the roadway, the rails, the rolling stock, may be classified and taxed five per cent, while other property is taxed only one per cent, how can we deny the proposition that the State may make of that property a class from which a certain deduction in the valuation shall not be made, though it is made upon the property of other persons? If you admit that the rate might be doubled or trebled upon this class of corporate property, by what principle do you contend that the valuation may not be doubled or trebled, or that there may not be a special classification as to the mode of valuation in the one which is not applicable in the other?

"Why the State should be taxed with injustice in pursuing such a course, I confess myself unable to perceive. The State simply says to these defendant corporations: 'The right to hold, use, and enjoy this property corporately you derive from the State. That right may be of little or no value; it may be that, to-morrow, you could operate this road as partners; it may be that you could operate it as individuals. But, you have not chosen to do so. You still choose to remain a creature of the State, deriving your right to hold and operate this road as a franchise from your sovereign. Now, you are the judges of what is best for you. You choose to remain a corporation and to use this property corporately, and we classify the property because it is used corporately and not otherwise. We do you no injustice. Disincorporate to-morrow, relinquish the right to use this property corporately, and we will not levy this tax. Disincorporate, if it is just as profitable to operate the Southern Pacific Railroad as individuals, and we will tax it as we do the property of individuals.'

"These defendants may escape, by a very simple process, the whole of these very heavy, harsh, and discriminating burdens which they complain of. Let them disincorporate—give up the corporate franchises derived from the State. The State will then demand nothing more from them than it does from me or anybody else. But they shall not have and enjoy what no individual has and not pay for it.

"But the proposition that has been urged most strenuously in these cases is that, while it is not disputed that the property, immediately used by the railroad in its operation, may be classified, yet, there is property in this corporation which is not specially devoted to the use of the railroad as a railroad; there are farming and grazing lands; and, as regards these lands, they cannot be classified by their use, and yet,

the State has made a discrimination against them. As I understand the argument on that point, it is this: Conceding that the property immediately used for the operation of the railroad is classified by its use, and that it may be made to bear a special burden, either in the rate of the tax or the valuation—in other words, that no deduction for mortgage may be made upon it—still, say the defendants, we have other property, farming and grazing lands, not immediately used for railroading, and, therefore, not classified by their use; and upon these lands you have imposed a burden not imposed on other lands similarly situated. You have, therefore, made an unjustifiable classification.

"The argument concedes, for the nonce, that the Constitution-makers might have made all strictly railroad property a class; but, because they have mingled in with this property, which they could thus classify, other property, which, it is assumed, they could not classify, therefore, the whole tax falls, as well that upon property which might be classified, as that upon the property which might not. That is the argument as I understand it.

"In answer to the argument, I say, in the first place, that it is not denied by the defendant corporations that they have acquired these lands in the exercise of the corporate powers granted by the State. It is admitted that they are corporate property. They are acquired by virtue of a franchise. They are held and used by virtue of a franchise. Being corporate property, held and used in the exercise of a franchise, they are, from that fact alone, susceptible of classification, as such. This I have heretofore endeavored to demonstrate.

"But, is the fact upon which defendants' argument is based true? Can it, in point of law, be true? The defendants are strictly railroad corporations—incorporated and organized as such. Can they, then, own property in no way connected with the railroad business? The defendants, in their answer, say:

"'The lands mentioned in the preceding subdivision are not and never have been in any way connected with the railroad business of the defendants. They are agricultural and grazing lands, held, owned, and used for farming and grazing purposes.'

"I deny, if your Honors please, that it is in the power of these defendants to acquire or use corporately any property beyond the limits which the State has fixed for their acquisition. The State has said to these defendants that they should acquire no lands except such as were connected with their business as a railroad. The State has not given them the privilege of a corporation for farming, nor for grazing. It has constituted them a railroad corporation; and all that they own, all that they have or acquire, must, in some manner, be connected with that business and made in some manner subsidiary to it. Whatever lands they, as corporations, acquire, be they grazing or farming lands, they acquire

by virtue of the permission of the State and the franchise of the State extended to them, enabling them to acquire lands for the purpose of building and operating their road, or helping to build and operate it.

"But, were it true that these farming and grazing lands are not susceptible of classification, does it follow, because they are classified with other property which is classifiable, and the whole is taxed together, that the whole tax is void? I should say, if your Honors please, invoking those rules by which laws and constitutions are upheld rather than overthrown by the coördinate branch of the government, the judiciary, that, if the Legislature had the right to do one thing, but not two things, and it has attempted at the same time to do both things, that we should hold their action effectual as to that thing which was not beyond their power, though ineffectual as to the other. I should say that we should not destroy the Act altogether, when the good and the bad are clearly divisible; but, on the contrary, hold it good as to that thing which was within the province of the Legislature. Concede, for the purpose of argument, that, as to these grazing and farming lands, it was beyond the power of the State to classify them for purposes of taxation. Still, I would answer: We are not seeking, here, to collect a tax against these grazing and farming lands. We are demanding nothing from them. We are demanding a tax from strictly railroad property, which, it is not denied, is, in itself, capable of classification. If, in the assessment of their farming and grazing lands, these defendants have been wronged; if they have submitted to a burden, a tax, that they might well have avoided, that is no concern of ours here. Their past grievances are not the business of this present inquiry.

"Suppose, if your Honors please, that the law of Pennsylvania, which imposed a tax on railroad gross receipts, and thereby classified railroads for the purposes of taxation to that extent, had imposed a similar tax upon the farming and grazing lands of the company, situated precisely as the farming and grazing lands here are said to be, would the whole tax be void? If the Pennsylvania Company, having already paid the alleged illegal tax upon its farming and grazing receipts, were sued for the confessedly legal tax upon its railroad receipts, could they defend against the latter tax? So, if the State of California should to-morrow pass a law that all bonds held in the State, United States bonds as well as municipal bonds, should be taxed at one per cent of their value, should the whole tax fall, when the class of bonds which are legitimate subjects of taxation can be so readily segregated from the class that is not? Or, should the Constitution of the State say that the homestead of a widow should be exempt from taxation, and the Legislature should pass a law taxing that as well as the other property of the widow, why might not the Court hold that the tax imposed upon the homestead

was improper, and retain the tax which was put upon the balance of the property? Why destroy the whole statute, when the vicious part can be so readily eliminated from that which is confessedly good?

"A striking illustration and application of the proposition that I am now trying to establish is found in the case of the State Freight Tax, the Pennsylvania case. There, the State of Pennsylvania had passed a law imposing an indiscriminate tax upon all the freight carried by railways in Pennsylvania. Now, the State could constitutionally impose the tax upon freight received for carriage wholly within the State, but not upon freight received for carriage to or from any part outside the State. Did it follow that the whole tax was void? No; the good was separated from the bad.

"Permit me to read the epitome of the case from this opinion of Justice Miller in *Stanley* vs. *The Supervisors*, in 105 U. S., because it sets forth clearly and distinctly the point that I am now addressing myself to. The Court said here: 'The case of the State Freight Tax, 15 Wallace, 232, arose out of a statute of Pennsylvania which attempted to impose a tax on commerce forbidden by the Constitution of the United States. The Act imposed a tax upon every ton of freight carried by every railroad company, steamboat company, and canal company doing business within the State. The railroad companies who contested the tax presented a statement which separated the freight transported by them between points solely within the State and limited to such destination, and that which was received from or carried beyond those limits. This Court held the latter to be void as a tax on interstate commerce, and did not declare the whole tax or the whole statute void. It said: It is not the purpose of the law, but its effect, which we are now considering; nor is it at all material that the tax is levied upon all freight, as well that which is wholly internal as that embarked in interstate commerce. The conclusion of the whole is that, in our opinion, the Act of the Legislature of Pennsylvania of August 25, 1864, so far as it applies to articles carried through the State, or articles taken up in the State and carried out of it, or articles taken up without the State and brought into it, is unconstitutional and void. The same language is repeated in *Erie Railway Company* vs. *Pennsylvania*, decided at the same time. Both cases were remanded to the State Court for further proceedings in conformity with the opinion, which could only mean to enforce the tax on transportation limited to the State, and not on interstate commerce. This is a clear case of distinguishing between the articles protected by the Constitution of the United States and those which were not, though nothing in the language of the statute authorized any such distinction.'

"Here, then, by the same statute, by the same law, a tax was imposed, in lump as it were, upon the freight of the road.

"I submit that this is a parallel case to the one at bar.

There, the State imposed an indiscriminate tax, part good, part bad. The taxpayer came into Court and showed what part was good and what part bad—what part the State could impose, and what not. The Supreme Court said that, although the tax was a unit, yet, as the good could be readily segregated from the bad, they would leave the good to stand and simply eliminate the bad. So, I say here, if we grant that the tax on the farming and grazing lands is bad, still, as the tax on the railroad is good, the latter shall stand though the former fall.

"But, even granting, if your Honors please, that the whole of our system of taxation, as applicable to these defendants, is bad, upon its face, because it does not permit them to make a deduction for mortgages, which other property owners are permitted to make; granting that it is so, even as to this strictly railroad property—granting all that, it does not follow *ipso facto* that the tax is void. The defendants assume that that conclusion inevitably follows. They take it for granted that if the law, upon its face, denies to the defendants the right to deduct a mortgage from the valuation of their property, while that deduction is permitted to other property similarly situated, that this is, in itself, an unjust, unconstitutional discrimination; that the system is bad, and, therefore, the tax is void. I deny that conclusion.

"The law which denies to the defendants the right to deduct this mortgage, if it contain a vicious principle, holds it as the cloud the thunder. Before the defendants can complain, the bolt must have fallen upon them. The defendants cannot complain of the mere system of taxation. They cannot complain of an injurious discrimination in the system, unless the facts of the particular case before the Court show that they are brought under the injurious effect of the system. They cannot complain unless, according to the judgment of the Court upon the specific facts before it, they are, in point of fact, injured. Their redress lies not against the system, but against the operation of the system. Courts do not annul laws because they are bad in the abstract, but because, in the concrete instance before the Court, they work injustice. Courts administer the law no further than the limits of the particular facts before them.

"This principle I find best stated in De Tocqueville. I read from the first volume, page 165 of the Paris edition of 1864. There the learned author says: 'The second characteristic feature of the judicial power is that it pronounces judgment upon particular instances and not upon general principles. A Judge may still remain within the proper limits of his special province, though, in deciding a particular case, he indirectly destroys a general principle; from the fact that each individual application of this principle being similarly affected, it results that the principle itself, in the end, becomes inoperative. If the Judge should directly attack the general principle and destroy it, without having

before him a case calling for its application, there he would transcend the bounds within which, by common accord, he has been confined. He may thus become something more important, more useful, perhaps, than a magistrate; but he would cease to be a representative of the judicial power.'

"I read this because it is an admirably clear statement of a principle which I do not, for a moment, suppose any lawyer would question. To give an illustration of what I mean, when I say that it is not sufficient that the law be bad, that it be an attempt to do something wrong, but that, to give title to legal redress in the particular instance before the Court, wrong must, in point of fact, have been inflicted by the law, I will suppose this case: Suppose the State of California should to-day be mad enough to enact that any person convicted of larceny should be fined, not to exceed a thousand dollars, and, if the culprit were a negro, he might, in addition, be imprisoned not to exceed one year. Suppose that a negro should be brought up and tried for larceny, found guilty, and thereupon sentenced to pay a fine of five hundred dollars. Suppose that, on habeas corpus, he moved for his discharge, upon the ground that the law made a palpably injurious, unjust, and invidious discrimination against him, and was, therefore, an undoubted, unmistakable denial of the protection of the Fourteenth Amendment of the Constitution of the United States. What would your Honors answer to the application. Doubtless, your answer would be: 'Granted that this law is bad, in its intent; granted that the Legislature that passed it was ignorant of the plainest dictates of duty, yet you have not been injured by the law. In point of fact there has been no discrimination. Were you a white man, were you of the favored class from which you are by this law attempted to be discriminated, you might well have been punished, just as you are punished now. The evil feature of the law has not injured you.'

"No clearer illustration of the principles for which I am now contending can be found than the case from which I have already read in 105 U. S., the case of *Stanley* vs. *The Supervisors*. We all know that the States, at an early day after the war, attempted to tax National Bank shares. We all know that such taxation was unconstitutional. We all know that it was so declared by the Supreme Court of the United States, because it was a tax upon a Federal agency. We all know that there was an Act of Congress granting States permission to tax National Bank shares, upon condition that they should tax them at the same rate as they did other moneyed capital in the State. Now, with that explanation, if your Honors please, the application of this case becomes apparent. The State of New York passed a law in pursuance of this permission granted by Congress, in which it said that, as to other moneyed capital, the taxpayer might deduct his debts from it, but, as to bank shares, they should be assessed without any deduction. The Supreme Court had

already decided, long before this case, that that was a violation of the principle of the permission given by Congress; that it was not taxing the bank shares of the National Banks at the same rate that other capital in the State was taxed.

"Now, I read from Justice Miller's opinion, page 305: 'The ground of this recovery was that the statute of New York under which the shares were assessed was void, because it did not permit the shareholder to make deduction of the amount of his debts from the valuation of his shares of stock in ascertaining the amount for which they should be taxed.

"Now, says the learned Justice: 'Accepting, therefore, as we must, the Act of 1866 as construed by the Court of Appeals of New York as not authorizing any deduction for debts by a shareholder of a National Bank, is it, for that reason, absolutely void? What is there to render it void as to a shareholder in a National Bank who owes no debts which he can deduct from the assessed value of his shares? The denial of this right does not affect him. He pays the same amount of tax that he would if the law gave him the right of deduction. He would be in no better condition if the law expressly authorized him to make the deduction. What legal interest has he in a question which only affects others?. Why should he invoke the protection of the Acts of Congress in a case where he has no rights to protect? Is a Court to sit and decide abstract questions of law in which the parties before it show no interest, and which, if decided either way, affect no right of theirs? It would seem that if the Act remains a valid rule of assessment for shares of State Banks and for individual bankers, it should also remain the rule for shareholders of National Banks who have no debts to deduct, and who could not, therefore, deduct anything if the statute conformed to the requirements of the Act of Congress. It is very difficult to perceive why the Act of the Legislature should be held void any further than when it affects some right conferred by the Act of Congress. If no such right exists, the delicate duty of declaring by this Court that an Act of State legislation is void is an assumption of authority uncalled for by the merits of the case, and unnecessary to the assertion of the rights of any party to the suit.'

"The learned Judge then quotes the decision in the case of the State Freight Tax, which I have already referred to, and goes on to say:

"'But, in a review of the cases in this Court on this subject, *Austin* vs. *Aldermen*, 7 Wallace, 694, will be found most nearly to resemble the one before us. It related to the same matter of the invalidity of a statute of a State taxing shares of the National Banks as being in conflict with the Act of Congress. That Act said that such taxes might be assessed at the place where said bank was located and not elsewhere. The statute directed the assessment and taxation of the shares at the place where the owner resided. Austin, having contested the tax on his shares in the Courts of the State, unsuccess-

fully, brought the case here by writ of error. This Court declined to enter upon the question of the validity of the statute, because the case did not show that he was taxed on his shares in any other place than that where the bank was located. The argument of counsel in the case before us is that any tax, or a tax, on any person, on account of his bank shares, is void, because the whole of the New York statute is void. If the argument is sound, it was equally applicable to Austin's case, in which the statute, which made no limitation of taxation to the place where the bank was located, must have been held void under any principle which would wholly invalidate the statute of New York, because the latter did not allow the deduction of the owner's indebtedness from his shares. And if in that case the Massachusetts statute was utterly void as to National Bank shares, then the tax on Austin's shares in Boston was void, and he had a right to be protected against the unconstitutional statute. The Court evidently went upon the principle that the statute was only void as against the Act of Congress, in cases where some one was injured by the particular matter in which there was such conflict. The case seems to us directly in point.'

"Then, says the learned Judge: 'This is a distinct and separable principle. When the shareholder has no debts to deduct, the law provides a mode of assessment for him, which is not in conflict with the Act of Congress, and the law, in that case, can be held valid. Under the decision in *Austin* vs. *Aldermen*, it is valid as to him. If he has debts to be deducted, the case of *People* vs. *Weaver*, 100 U. S., shows that, in taking the steps which this Court has held he may take, he can secure that deduction, and, when secured, the rest of the law remains valid. In other words, in such a case, so much of the law as conflicts with the Act of Congress, in the given case, is held invalid, and that part of the State law which is in accord with the Act of Congress is held to be the measure of his liability. There is no difficulty here in drawing the line between those cases to which the statute does not apply and to those to which it does between the cases in which it violates the Act of Congress and to those in which it does not. There is, therefore, no necessity of holding the statute void as to all taxation of National Bank shares, when the cases in which it is invalid can be readily ascertained on presentation of the tax. It follows that the Assessors were not without authority to assess National Bank shares; that, where no debts of the owners existed to be deducted, the assessment was valid and the tax paid under it a valid tax.'

"In the subsequent case, in the same volume, of the *Evansville Bank* vs. *Britton*, the Court reiterated that proposition and said: 'The brief of counsel in this case, in various forms, repeats the idea that the bill was brought not so much to assert the rights of stockholders who may have been injured by the enforcement of the statute, as to obtain a judicial declaration of this Court that the Act is void, and the

attempt to tax the shares of the bank equally so. Having, in *Supervisors* vs. *Stanley*, rejected this proposition, and given our reasons for it, we shall not repeat them here.'

"In other words, if your Honors please, the parties cannot come into this Court, present the law to your Honors, abstract it from the facts of this particular case, and call upon your Honors to decide the abstract question that the law is void. Say these decisions: 'Granting that the law, upon its face, shows a wicked purpose and intent, still you must show by the facts of the case before the Court, that you have been injured by that law. Until you do so you have no standing in Court.'

"These defendants obviously appreciate, and have appreciated from the beginning, the force and cogency of the principles to which I advert. They well understand that they have no standing in Court, unless they can show that they have a mortgage which might have been deducted from the value of this property. That is the very basis of their case. Had they come in here and set out the obnoxious statute at length, but said nothing about their having a mortgage or showing that they were, in point of fact, in this particular case, injured by the law, then, by virtue of these principles, your Honors would have held a demurrer to their answer well taken.

"Now, in the light of those decisions, I say to these defendants: When the railroad or other quasi-public corporation has no mortgage to deduct, then the law provides a mode of assessment valid for them which is not in conflict with the Fourteenth Amendment. The law in that case can be held valid. Under the decision in *Austin* vs. *Aldermen* it is valid as to them. The defendant must show that he is injured. If he does not, then 'the delicate duty of declaring by this Court that an Act of State Legislature is void is an assumption of authority uncalled for by the merits of the case, and unnecessary to the assertion of the rights of any party to the suit. The Court will not sit and decide abstract questions of law in which parties have or show no interest, and which, if decided either way, affect no rights of theirs. If the defendant pays the same amount of tax that he would if the law expressly gave him the right of deduction, if he would be in no better condition, if the law expressly authorized him to make the deduction, he has no legal interest in the question. He has no right to invoke the protection of the Act in a case where he has no rights to protect.'

"These general principles being established, I now proceed to inquire into their application to the facts of this particular case. The defendants must show that they have a mortgage. The defendants have shown that they have a mortgage, and have set it out. I call your Honors' special attention to this clause in the mortgage of the defendants:

" 'The said party of the first part hereby agrees and covenants to and with the said parties of the second part, and

their successors in said trust, that it will pay all ordinary and extraordinary taxes, assessments, and other public burdens and charges which shall or may be imposed upon the property herein described and hereby mortgaged, and every part thereof; and the said parties of the second part, the survivors of them, and their successors in said trust, or any one or more of the holders of such bonds may, in case of default of said party of the first part, in this behalf pay and discharge the same and any lien or incumbrance upon said property which may in any way, either in law or equity, be or become in effect a charge or lien thereon prior to these presents, or to which this mortgage may be subject to, or subordinate, and for all payments thus made, the party so making the same shall be allowed interest thereon at the rate of seven per centum per annum, and such payments, with the interest thereon, shall be and are hereby secured to them by these presents, and declared to be payable and collectible in the same sort of currency or money wherein they shall have been paid, and the same shall be payable by the said party of the first part to the said parties of the second part upon demand in trust for the party or parties paying the same, and may be paid out of the proceeds of the sale of said property and franchise hereinbefore described.'

"This is the mortgage. This is one of the covenants of the mortgage which these defendants have adduced, in order to prove to the Court that they are injuriously affected by the system under consideration. Now, in view of this covenant, I say: What interest have they in the question as to whom this land shall be assessed? Whether it be assessed in two parcels or in one, whether it be assessed to John Doe or Richard Roe, or a dozen others, however it is assessed, into however many minute fragments it be subdivided, whether it be assessed in lump or in parts, they have, by this solemn contract, bound themselves to pay the tax upon it and the whole of it. Not only have they done that, but they have agreed that they will pay all liens, all incumbrances, all charges which shall be imposed upon this property. The taxes of the State are a lien upon the property—a charge upon the property. This charge, this lien, they themselves have agreed to discharge. Practically, therefore, how are they injured? How are their rights affected by the fact that the State has not deducted this mortgage, or, rather, has not assessed this mortgage interest separately when it assessed the property?

"Had they been a private individual, how would this property have been assessed? The property would have been assessed in two parts—one part to the owner of the fee, the remainder to the owner and holder of the mortgage. The whole property, and no more, would be assessed, only it would be assessed in fragments, and the tax, instead of being collected from one source, would be collected from two sources. Now, I say to these defendants: 'Supposing that that had been done; supposing that the system of which you complain

had not been applied; supposing that your property had been assessed, the mortgage to the mortgagee and the residuary interest to the mortgagor, in two parts, and a tax had been assessed upon it, then, by the very terms of your mortgage, by the very terms of the instrument which you now invoke, by the very terms of the solemn covenant which you read to the Court, you yourselves would have paid the whole, every dollar, of that tax. How then are you injured in point of fact? The very instrument you produce to convince the Court that you are injured, shows that you are not. The poison which you hold to your lips contains its antidote. Are you called upon, to-day, to pay one dollar more of taxes than you would have had to pay under the system under which you say you ought to be taxed? No. You pay the same tax and no more. You bear the same burden. You can only claim that you would be injured by asserting that you yourselves would be guilty of the dishonesty of violating a solemn stipulation of your contract. If you are just, if you obey the law, if you conform with the provisions of that stipulation, you pay the same tax, and no more, that is demanded from you to-day.'

"The injury to these defendants, by this alleged obnoxious and pernicious system is, if it exists at all, a mere imaginary, a mere theoretical, a mere abstract injury. In point of fact, no man of sense can say that they are hurt.

"This being so, did I entertain the hope that, by any appeal of mine, I could induce your Honors to reverse your former judgment, I would call upon you to decline the exercise of an unnecessary jurisdiction. I would call upon you to decline, in the present exasperated state of public feeling, to pronounce a merely irritating decree, not needed for the protection of the substantial rights of any one. I would call upon you, in the language of that august tribunal whose decisions you are sworn by your oaths of office to obey, to decline the delicate duty of declaring that the Constitution of this sovereign State is void, where your decision is an assumption of authority uncalled for by the merits of the case, and unnecessary to the assertion of the rights of any party to the suit."

It was further contended, on behalf of the plaintiffs in error, in the Court below, by Hon. A. L. Rhodes, as follows:

"Having presented to this Court, on the hearing of the case of *San Mateo* vs. *S. P. R. R. Co.*, the legal propositions upon which, in my view, the solution of the Federal questions depend; having again presented them to the Supreme Court, and argued them at length, I shall content myself with stating those propositions, and arguing, to limited extent, only a few of them.

"1. The defendant is not a Federal instrument or means, as defined in *McCullock* vs. *Maryland*, 4 Wheat. 316; *Weston*

vs. *Charleston*, 2 Pet. 449; *Osborn* vs. *U. S. Bank*, 9 Wheat. 738, and cannot claim any exemption from taxation by the State, on that ground.

"2. The defendant does not possess a Federal franchise. It occupies merely a contract relation with the United States as does a person who contracts to carry the mails in a stage coach, or one who agrees to supply a military post with grain.

"3. The defendant does not possess a Federal franchise. The defendant, by the very nature of its being, is incompetent to receive such a franchise. It can enjoy only the powers and capacities given to it by its creator.

"4. If it does possess a Federal franchise, that franchise was not assessed by the State Board. It will be presumed, until the contrary be shown, that the State Board discharged its duty, according to law.

"5. The possession, by the defendant of a Federal franchise, does not preclude the State from taxing all of the defendant's property, including its franchise derived from the State.

"6. Corporations are not embraced within the last clause of the first section of the Fourteenth Amendment of the Constitution of the United States, which prohibits a State to deny to any *person* within its jurisdiction, the equal protection of the laws.

"7. Should it be held that corporations are *persons* within the meaning of that provision, then on the same grounds that the defendant presents, natural persons can rightfully demand and enjoy all the special rights, privileges, and immunities granted to corporations—and thus corporations are virtually eliminated, or all persons in effect become corporations.

"8. The State possesses the power to alter, amend, or repeal *any* provision of the charter of corporations, or of any class of them. In this respect it makes no difference whether the provision which is sought to be altered, amended, or repealed is a contract, coming within the power reserved by the State, in the formation of corporations; or is one of the class of provisions which the State always possessed the power to alter, amend, or repeal without the aid of the reserved power.

"9. The defendant is not denied 'due process of law' by the mode adopted by the State for the assessment of railroad property.

"10. The law imparted to it all the notice of the assessment that any taxpayer can demand as a constitutional right.

"11. The power of taxation is an element of State sovereignty. It is essential to the existence of the State.

"12. This sovereign power of taxation comprehends the use of all the methods of taxation known to the laws of a State, whose constitution or statute provides for equality in taxation.

"13. The clause of the Fourteenth Amendment providing for the equal protection of the laws, was not intended to have,

and does not have, any application to the administration of the revenue laws of a State.

"14. A franchise is property, and is so declared to be by the State Constitution; and, therefore, it is taxable within the State, unless the Federal Constitution prohibits it.

"15. The provision of the State Constitution declaring that mortgages, deeds of trust, etc., are, for revenue purposes, deemed to be interests in the property affected thereby, and that such interests shall be taxed to the owners thereof, and that the remaining interests in the property shall be taxed to the owners thereof, is not in any proper sense a *deduction* from the value of the property—but simply a division of the property into two or more parcels for the purpose of taxation.

"16. The State has an uncontrollable discretion in the classification of property for the purposes of taxation. And, in this regard, it makes no difference whether classification is the purpose or merely the result of the law.

"17. The State may assess several parcels of property together as a *unit*. All the property of a railroad company may be so classified and assessed.

"18. If such a system in its operation does not result in double taxation on property, there is no legal cause of complaint, on the ground that the assessment is not made to, or distributed among, the several persons interested in the property.

"19. The revenue system, provided by our Constitution, is taxation upon property, except so far as Sections 11 and 12 of Article XIII authorizes taxation of incomes, and polls and license taxes.

"20. It is not material, in view of a provision requiring equality in taxation, to whose name property, or the several interests therein, are assessed, nor even whether assessed to the name of any person. No valid objection could be made to a law requiring all property to be assessed to unknown owners. Where the rate of the tax is the same upon all property, the only inquiry is, whether the property is subjected to *duplicate taxation*, excepting only the cases where the statute expressly directs the property to be assessed to the person or persons bearing a particular relation to the property.

"21. No valid objection can be made to a revenue system because it provides for the assessment of property of a specified class as a unit—such as railroads operated in more than one county.

"Nor because it provides for the assessment of such property, by a State Board, while providing for the assessment of all other property by a County or Township Assessor.

"Nor because it provides that the property of quasi-public corporations shall not, for the purposes of assessment, be divided into two or more portions, representing the respective interests of the mortgagors and the mortgagees, while it provides for such a division of other property.

"THE POWER OF THE STATE TO ALTER, AMEND, OR REPEAL CHARTERS OF CORPORATIONS.

"While recognizing the clearness and force of the analysis, by one of the counsel for the defendants, of the constitutional reservation of the power to alter, amend, or repeal the charters of corporations, the argument deducible from his propositions will not assist in solving the question, whether the mode adopted by the State, for the assessment of this class of corporations, is an amendment of the charter, or if it is, whether it can be maintained. For, prior to any such reservation of power by the State, the power was always possessed by the State to amend or repeal any provision of the charter which did not constitute a contract. After the reservation of that power, *every provision* of the charter was subject to legislative amendment or repeal.

"If the charter contained a provision respecting the taxation of the corporation, or its property, that provision might be amended; and if the charter was silent on that subject, the charter might be amended by the insertion of such a provision. Leaving out of view any limitation that may be found in the Constitution of the State respecting taxation, there is no more ground for saying that a charter cannot be amended, by the insertion of provisions fixing the rate of the tax, than there would be to say that the State had not the power to make a special provision in the charter for a specified rate of taxation, or for exemption from taxation, as was done in numerous instances before the adoption of the constitutional rule requiring the creation of corporations by general laws.

"It is contended by the defendants that the provision of the Constitution, in respect to the taxation of the property of quasi-public corporations, is not an amendment of the charters of such corporations, because it is found in the article respecting revenue. That cannot be a test. Neither the Constitution nor the statutes of this State can be construed by such a test. But, if that be a proper test, then it is insisted that by the application of it to Section 1 of the Fourteenth Amendment, corporations will be excluded; for it has many times been repeated that the purpose of that section was to secure protection to the persons who had recently been emancipated.

"*Strauder* vs. *West Virginia*, 100 U. S. 303.
"*Virginia* vs. *Reeves*, 100 U. S. 313.

"There would appear to be no difficulty in holding a law, providing the mode for the assessment of quasi-public corporations to be an amendment of their charters.

"THE DEFENDANTS DO NOT POSSESS A FEDERAL FRANCHISE.

"The corporation was *created* by the State, and possesses and can possess only such rights, powers, etc., as its creator gave to it. It has no capacity to take any other or further right or power than such as was conferred by the law of its creation. The charter is a *limitation* as well as a grant of power. Should the United States attempt to confer upon a homestead corporation the power to issue its bill as money, we are confident that no one would uphold such an act. The grant by the United States of power to a State corporation would destroy the uniformity of charters intended by our Constitution. The grant of the right of way or of lands to a corporation is not the grant of a franchise. Any private person could make such a grant of or over his lands, without subjecting himself to the imputation of having granted a franchise.

"THE POWER OF THE STATE TO PROVIDE DIFFERENT MODES FOR THE TAXATION OF PROPERTY.

"In a State in which there is only one rate of taxation, and in which all the property within its jurisdiction is to be taxed according to its actual value, no valid objection can be found to a law which provides for, or results in, a *classification* of property for the purpose of ascertaining its value, as a convenient mode to aid in its assessment. The revenue systems of most, if not all, of the States, contain provisions by which property is classified, for that purpose; and they have not heretofore been thought to be beyond the power of the State. A law requiring personal property to be assessed annually, and real estate once in five years, is a classification of property for the purpose of assessment.

"The provision of the Constitution of Illinois, a portion of which was under review in State R. R. Tax Cases, 92 U. S. 578, requiring the capital stock, including the franchise of corporations, to be assessed by a State Board, while requiring all the tangible property of the corporations to be assessed by local Assessors, is first a classification of property, as between private persons and corporations, and is also a division of the property of corporations into two classes, one of which is to be assessed by the State Board, and the other by local Assessors.

"A still further classification was produced by that system. Separate provisions were made for the assessment of the property constituting railroads; and such property was again classified, so that portions of the property used in operating railroads were assessed by local Assessors, while other portions and the franchise were assessed by a State Board. That system is very fully stated in the report of the State R. R. Taxes, 92 U. S. 577.

"The Fourteenth Amendment cannot, by the most latitudinarian construction, be held to prohibit such classifications and different modes of assessment.

"Should a State deem it politic, to require lands held in common, to be assessed to the several tenants in common, while requiring lands held under leases to be assessed to the landlords, without regard to the several interests of the tenants and subtenants, there would seem to be no constitutional objection to such provisions. A provision, to the effect that railroad property, including the franchise, should be assessed as a unit, would seem to be equally free from objection.

"The policy and propriety of requiring a railroad, operated in more than one county, to be assessed as a unit, and by a State Board, instead of in parcels, and by county, district, or township Assessors, are too obvious to require a word in their support, and the system seems to be equally free from all constitutional objections.

"The property of quasi-public corporations has been arranged in one class; and, in respect to that class, the Constitution provides that the property of such a corporation shall be assessed to it, without any division of the property, as between the corporation and the holders of a mortgage, deed of trust, etc., which may be a lien upon the property; while such division is required to be made, in respect to property held by others than such quasi-public corporations.

"No objection can be found to that classification that might not be made to any other which could be proposed or made, except the one which is so often and earnestly urged in these cases, and that is, that this is a classification based on ownership; and this, it is claimed, operates as an invidious and unjust discrimination.

"The power of classification being conceded, its exercise is not subject to revision or review, for, by the very nature and necessities of the power, it is based upon and involves the exercise of discretion. It is not claimed that under the guise of classification a provision of law which amounted to mere confiscation would be upheld. It is as well known to the judicial as to the legislative departments, that in the case of many corporations—such as railroad corporations—mortgages and deeds of trust are executed to secure the bonded debt of the corporation; that the bonds are held all over the commercial world, wherever such paper is marketable; and that an attempt to tax the property of the corporation so as to reach directly the bondholders would be futile in the extreme sense. In such case, it would be but the dictate of sound policy to assess the corporate property to the corporation. In the exercise of a similar discretion, the revenue laws of certain States have required all the deposits in the savings banks to be assessed to the banks; the capital stock of certain corporations to be assessed to the corporations; the property of married women to be assessed to their husbands;

the interests of the heirs in the undivided property of the estates of deceased persons to be assessed to the executors or administrators; the interests of the several partners in the partnership property to be assessed to the firm; and personal property mortgaged or pledged to be assessed to the party in possession. In all these, and many other instances that might be enumerated, the classification was based on ownership; and still it was not thought that the classification was invalid. It has not been so held in any adjudged case, so far as we are aware.

"It would be difficult, and apparently impossible, to maintain the position that a revenue system was invalid which required all corporations, or all of those classes of corporations having capital stock, to be assessed only upon their capital stock and the value of their debts, without any assessment either upon the tangible property of the corporations or on the shares of stock held by the stockholders; and still that would, in one sense, be classification based on ownership. It is not based on the ownership of any given persons, such as the principal corporators, but on the ownership of that class of corporations and the use to which the property was devoted; and that method, when adopted, is employed as a convenient and just mode for the ascertainment of the value of the property of the corporations; and where the law fixes one rate for all property, the result is equality in taxation, or as near equality as the rule of equality will exact.

"Without infringing any constitutional provision, intended as the safeguard of individual rights, a revenue system may provide that one class of property, to be ascertained by the uses and purposes to which it is devoted, shall be divided for the purposes of assessment, into as many parts as there are interests in the property, such as the several interests of the lessee, the mortgagee, the vendee, etc., and the owner of the fee; while property of another class may not be divided for the purposes of assessment. It may provide, also, that the property of a particular class shall be assessed as a unit, without regard to the fact that it is composed of real property, improvements thereon, and personal property. And it may also provide that a particular class of property shall be assessed by a State Board, while all other classes of property are assessed by local Assessors.

"Without pursuing the discussion further, and without presenting any argument upon several of the propositions above stated, I am content to leave the argument to my associates in these cases; with an unshaken confidence that the property of these defendants will be compelled to bear the proper share of the burdens of State taxation."

In presenting what was said as to the prospective operation of the State Constitution of 1879, we desire to urge a close attention to this point in the argument. The proposition was

not orally submitted to the Court below and seems not to have been considered. We deem it fatal to the defense, interposed in behalf of the corporations, and especially is this so when the point is considered in connection with the further arguments made: that the defendants not being hurt cannot be heard to complain. The following printed argument was made in that behalf by W. T. Baggett, Esq.:

"I.

"*Section 4 of Article XIII of the Constitution is* PROSPECTIVE *in its operation.—Contracts of mortgage executed prior to its adoption are not affected by it.*

"The general rule of construction is, in the absence of words to the contrary, that constitutional provisions do not have a retroactive operation.

"But there is no inhibition against the power of a State to give its Constitution a retroactive operation, if it does not thereby impair the obligation of contracts then existing. It would, therefore, follow as a legitimate conclusion, that if a State could not pass a law which would impair the obligations of existing contracts, a law which does not, in direct terms, act retrospectively should never be construed to so act; that construction should be given it as would permit it to exist as a valid law.

"Section 4 of Article XIII of the Constitution of this State, which is directly attacked by the defendants to this action, does not in *terms* act retroactively; but it is sought to give it such an operation. Indeed, the defense interposed rests solely upon such a construction. Now, if to give it such a construction would be to destroy it, such a construction should not and cannot be given it.

"That the defendants insist upon such a construction is made certain when we consider the character of their defense. They assert that there exists a mortgage on their property which has not been deducted in fixing the value of the property for the purpose of taxation. This mortgage is made an exhibit, and it appears therefrom that it was executed in 1875, prior to the adoption of these provisions of the Constitution. If these provisions are prospective the defendants cannot attack them, for neither individuals nor corporations can deduct their mortgages where the contracts were made prior to the adoption. So, therefore, it is plain that the defendants claim for these provisions a retroactive operation.

"We come now to consider whether it is possible for these provisions to be so construed. If to so interpret them would be to impair the obligations of existing contracts, it is self-evident that the Courts will never so interpret them.

"II.

"*Section 4 of Article XIII if applied to contracts of mortgage existing at the date of its adoption would impair the obligation of those contracts.*

"By the thirteenth article of the Constitution, 'a mortgage, deed of trust, contract, or other obligation, by which a debt is secured,' is treated for the purposes of assessment and taxation 'as an interest in the property affected thereby,' and '*except as to railroad and other quasi-public corporations*' the value of the property affected, less the value of the security, is to be assessed and taxed to its owner, and the value of the security is to be assessed and taxed to its holder.

"This provision is novel; but all who are acquainted with its history cannot mistake its purpose. There had been a long and bitter strife in the State upon the subject of taxing solvent debts—debts secured by mortgage. Taxing the debt secured by the mortgage and the whole property was double taxation. To tax the whole property to the owner without deducting the incumbrances was double taxation to him and an exemption to the holder of the security. To reach the property *once*, and the *whole* of it, and to properly distribute the tax, was the object of the provision. This end was most admirably accomplished by treating the mortgage as an interest in the land, and to that extent taxing the holder thereof—the remainder being taxed to the owner of the fee. Prior to the adoption of this provision the Supreme Court had held that solvent debts—debts secured by mortgage—were assessable. This decision was acquiesced in the subsequent case of *People* vs. *Eddy*, 43 Cal. 331.

"But still later and in the Hibernia Bank case this doctrine was completely overthrown, and it became thoroughly established, as the law of the land, that under the Constitution, as it then existed, solvent credits were not property within the meaning of the term as used in the revenue system of the Constitution.

"But this provision does not bring into existence any new subject of taxation, as is generally believed. This is a popular fallacy. It is also a misnomer to call the taxation of the value of the security to the holder a taxation of his security. There is but one thing taxed—that is the property. The provision is but a system of adjusting the tax imposed upon the property. The system commends itself to every one. The owner of the fee pays taxes on all that can be justly and practically said to be his own—what is left after deducting what he owes; the holder of the mortgage debt *in effect* pays upon the money he has loaned.

"I have been unable to find in the debates of the Constitutional Convention when this article was before them, any

expression as to the effect intended on existing contracts. It is apparent that they were more concerned for the future than the past. In the absence of any avowed purpose respecting the operation of the provisions, I invoke the aforementioned principle of construction, to wit: a prospective operation.

"But, had the Constitution makers expressed in the most positive language, and carried their expressions by unmistakable terms into the article itself, it could not have been other than prospective. There is nothing that the Federal Constitution guards more sacredly and jealously against the antagonistic legislation of the States, than existing contracts.

"As early as 1810 the Supreme Court of the United States in *Fletcher* vs. *Peck*, 6 Cranch, 87, began to construe and apply this provision of the Federal Constitution. It was then held that the provision extends to all contracts executory and executed. Again, in *New Jersey* vs. *Wilson*, 7 Cranch, 164, and again in *Territ* vs. *Taylor*, 9 Cranch, 43, the same protection was invoked, and the Court threw the safeguards around the petitioners, and they found shelter under the broad and liberal views the Court had by this time extended to the provision.

"But the Court soon found that it was necessary to go still further; it was no sooner established that the *right* could not be impared *directly* than an attempt was made to reach it *indirectly*—by destroying the *remedy*. The decisions rendered upon this point are interesting and instructive. They are not only valuable with respect to similar cases possessed of similar facts, but the language of the Court applicable generally to all cases involving a construction and application of this law, is particularly important.

"In *Green* vs. *Biddle*, 8 Wheat., the controversy grew out of a compact between the States of Virginia and Kentucky. It was made in contemplation of the separation of the territory of the latter from the former and its erection into a State, and is contained in an Act of the Legislature of Virginia, passed in 1879, whereby it was provided 'that all private rights and interests within' the district of Kentucky 'derived from the laws of Virginia prior to such separation, shall remain valid and secure under the laws of the proposed State, and shall be determined by the laws now existing in this State.' By two Acts of the Legislature of Kentucky, passed subsequently, several new provisions relating to the consequences of a recovery in the action of ejectment—eminently beneficial to the defendant and onerous to the plaintiff—were adopted into the laws of that State. So far as they affected the lands covered by the compact, they were declared void.

"And it is said: 'It is no answer that the Acts of Kentucky now in question are regulations of the *remedy*, and not of the right to the lands. If these Acts so change the nature and extent of existing remedies as materially to impair the rights and interests of the owner, they are just as much a violation

of the compact as if they overturned his *rights* and interests.' And it is further said: 'The objection to a law on the ground of its impairing the obligation of a contract can never depend upon the extent of the change which the law effects in it. Any deviation from its term, by postponing or accelerating the period of performance which it prescribes, imposing conditions not expressed in the contract, or dispensing with those which are, however minute or apparently immaterial in their effect upon the contract of the parties, impairs its obligation.'

"In *Bronson* vs. *Kinzie*, a mortgage was executed in Illinois containing a power of sale; subsequently an Act of the Legislature was passed which required mortgaged premises to be sold for not less than two thirds of the appraised value, and allowed the mortgagor a year after the sale to redeem. It was held that the statute by thus changing the preëxisting remedies impaired the obligations of the contract, and was therefore void.

"In *McCracken* vs. *Haywood*, 2 How. 611, the same principle was sustained and applied. A statutory provision that personal property should not be sold under execution for less than two thirds of its appraised value was adjudged, so far as it affected prior contracts, to be void.

"In the opinion in *McCracken* vs. *Haywood*, Justice Baldwin uses this language: 'The obligation of a contract consists in its binding force on the party who makes it. This depends on the laws in existence when it is made; those are necessarily referred to in all contracts, and forming a part of them as the measure of the obligation to perform them by the one party and the *right* acquired by the other. There can be no other standard by which to ascertain the extent of either than that which the terms of the contract indicate, according to their settled legal meaning. When it becomes consummated the law defines the duty and the right, compels one party to perform the thing contracted for, and gives the other a right to enforce the performance of the remedies then in force. If any subsequent law affects to diminish the duty or impair the right it necessarily bears on the obligation of the contract in favor of one party to the injury of the other; hence any law which in its operation amounts to a *denial* or *obstruction* of the rights accruing by a contract, though professing to act only on a remedy, is directly obnoxious to the prohibition of the Constitution.'

"In *State Tax on Foreign Held Bonds*, 15 Wall. 300, Mr. Justice Field, speaking for the Court, says: 'The obligation of a contract depends upon its *terms* and the means which the law in existence at the time affords for its enforcement. A law which alters the terms of a contract by imposing new conditions or dispensing with those expressed, is a law which impairs its obligations; for such a law relieves the parties from the *moral* duty of performing the original stipulations of the contract, and it prevents their legal enforcement.'

"This general language is used in *Sturges* vs. *Crowninshield*, 12 Wheaton, 257:

"'The obligation of a contract is the law which binds the parties to perform their agreement.'

"And in *Hoffman* vs. *Quincy*, 4 Wall. 552:

"'The prohibition has no reference to the degree of enforcement. The largest and the least are forbidden.'

"Justice Field says in *Louisiana* vs. *New Orleans*, 102 U. S. 203:

"'The obligation in the constitutional sense is the means provided by law by which it can be performed—by which the parties can be obliged to perform it. Whatever legislation lessens the efficacy of these means, impairs the obligation. If it tend to postpone or retard the enforcement of the contract, the obligation of the latter is to that extent weakened. The Latin proverb, *qui cito dat bis dat*—he who gives quickly, gives twice—has its counterpart in a maxim equally sound—*qui serius solvit minus solvit*—he who pays too late, pays less.'

"In *Edwards* vs. *Kearzey*, 96 U. S. 600, the question before the Court was one respecting the right of the States to pass exemption laws. It was held, after a review of many of the cases, that where the exemptions sought to be made were so many or so consequential as to impair preëxisting contracts by destroying or materially and substantially impairing the remedy for their enforcement, the law was unconstitutional; and this general language is employed: 'The obligation of a contract includes everything within its obligatory scope, and among these elements nothing is more important than the means of enforcement.'

"And in *Walker* vs. *Whitehead*, 16 Wall, 314: 'The laws which exist at the time of the making of a contract, and in the place where it is made and to be performed, enter into and make part of it. This embraces those laws alike which affect its validity, construction, discharge, and enforcement. The remedy or means of enforcing a contract is a part of that 'obligation' of a contract which the Constitution protects against being impaired by any law passed by a State.'

"Since these views have been stated and reiterated it can no longer be doubted but that the Supreme Court of the United States are determined to give this provision the *broadest* interpretation—extending it to the *remedy* as well as the *right*. There shall be *no* impairment of the *obligation*. The obligatory scope embraces everything that gives value to the contract. Yet, notwithstanding these solemn declarations of the Court, and notwithstanding the employment of the language which I have quoted above—comprehensive enough to reach every imaginable case—the same Court has recently been asked to hold that this provision did not impinge upon the State *taxing* power. And while conceding the almost unlimited powers of the States in this regard, it was held that there existed no reason for a relaxation of the principle

applied to the exercise of all other powers of the State, and that in the exercise of the taxing power the same sacred regard must be extended to preëxisting contracts.

"This was decided in *Murray* v. *Charleston*, 96 U. S. 422. With reference to this point the Court said:

"The provisions in that Constitution (Federal) that no State shall pass a law impairing the obligation of contracts, is a limitation upon the taxing power of a State as well as upon all its legislation, whatever form it may assume. Therefore a law *changing the stipulations of a contract*, or *relieving a debtor from strict and literal compliance* with its requirements enacted by a State in the exercise of that power is unconstitutional and void. And very much to the same effect in *State Tax on Foreign-held Bonds*. The facts were: A law of Pennsylvania passed on the first day of May, 1868, required the Treasurer of a company, incorporated and doing business in that State, to retain five per cent of the interest due on bonds of the company, made and payable out of the State to non-residents of the State, and held by them. It was held to be not a legitimate exercise of the taxing power of the State. It is a law which *interferes between the company* and the *bondholder*, and under the pretense of levying a tax impairs the obligation of the contract between the parties.

"Now let us apply the principles so clearly and satisfactorily established in the cases cited to the facts of the case in hand. What are the facts? On the first day of April, 1875, the defendant (Southern Pacific R. R. Co.) was indebted to divers persons in large sums of money, to wit: $46,000,000 advanced to construct and equip its railroad. To secure the payment the defendant did on that day execute a mortgage or deed of trust, with Lloyd Tevis and D. O. Mills as Trustees. Among the stipulations and conditions of the mortgage appears the following: 'And the said party of the first part (defendant) hereby agrees and covenants to and with the said parties of the second part (Mills and Tevis, Trustees), and their successors in said trust, that it will pay all ordinary and *extraordinary taxes*, *assessments*, and other public burdens and charges which shall or may be imposed upon the property herein described and hereby mortgaged, and *every part thereof*.' In 1879 the present Constitution of this State was adopted, containing the provisions of Section 4 of Article XIII, as above quoted. The present action is for taxes for the year 1881 on the franchise, roadway, roadbed, rails, and rolling stock of defendant's railroad, at the rate of $16,500 per mile. Payment is resisted chiefly because the assessment, according to which the taxes were levied, was made in pursuance of what it terms the discriminating provisions of the Constitution, in the enforcement of which the company was not allowed any deduction from the value of its property for the mortgage thereon, and was thus subjected to an unjust proportion of the public burdens, and denied the equal pro-

tection of the laws guaranteed by the Fourteenth Amendment to the Federal Constitution.

"It is not claimed that the rate of taxation has been increased, nor that the property is subjected to a heavier burden than the other property of the State; but what is demanded by the defendant is, that instead of paying the whole tax as agreed and covenanted by them when the deed of trust was executed, they ought to be relieved of the payment to the extent of the debt secured by the mortgage, which in this case amounts to an entire exemption, as the mortgage is for more than $30,000 per mile, and the assessment but $16,500.

"In other words, the defendant is asking this Court to declare that the Constitution has lifted a burden from their shoulders, voluntarily and solemnly assumed by the very terms of their contract, and laid it upon those of their creditors. It is asking the Court to so construe the provision of the Constitution as by it *new conditions* are added to the contract of mortgage, *expressed stipulations* eradicated, *new and different burdens* imposed on the one of the parties to the contract, and *material exemptions* made in behalf of the other.

"After what has already been said by the Supreme Court of the United States in the cases referred to, will it be believed for a moment that there is not in all this an impairment of the obligation of the contract?

"Under our system of revenue every tax has the effect of a judgment against the person, and every lien created has the force and effect of an execution duly levied against *all* property of the delinquent.

"Pol. Code, 3716.

"If Section 4 of Article XIII be applied to preëxisting mortgage contracts, the mortgagee is, by its terms, *forced* to *own* an interest in the property which secures his debt, and he thereby becomes *personally* liable to pay the tax to the extent of that interest, and the tax becomes a lien upon *all* his property. *He* is required to pay; the State knows no other person. The *mortgagor* is to pay *only* upon the remainder; the State knows no one else. How can it be said that this change of the *right* and the *remedy* does not impair the obligation of the contract?

"Blot out the obnoxious (?) part of the section, 'except as to railroad and other quasi-public corporations,' and under a new assessment who will then be the defendants to an action brought to compel the payment of taxes assessed to the holder of the security? D. O. Mills and Lloyd Tevis will meet you at the threshold and tell you they owe you nothing; that by the expressed stipulations of the trust deed they are to pay no taxes. *And they would be right.* It is no answer to say that they should pay, and then recover of the Southern Pacific Railroad Company under the stipulations of their contract. They are entitled to a 'strict and literal compliance' of the terms. The law of the land formed a part of it, and it is

their right to demand its fulfillment to the letter. The defendants complain and say that these provisions are discriminating; that they are not dealt with as private individuals; that private individuals are thus permitted to *avoid* the burdens of their contracts. This cannot be. In this respect the Constitution, when properly construed, makes no distinction. Neither the individual nor the corporation is permitted to escape the conditions of their contracts. All must pay their taxes without deduction when they have stipulated to do so. Any other construction of Article XIII would make it a dead letter, and the Courts will not so construe it.

"Therefore, since it is plain that the Constitution is *prospective*, it results that the defense interposed must fail, and judgment must go for the plaintiff."

There are certain State issues raised by the pleadings and passed upon by the Circuit Court, to which we will now allude. The discussion of these issues also involve important suggestions with reference to the Federal questions. The following argument was made by Hon. David S. Terry:

"One of the first propositions made was that the assessment ought to have been made separate—that is, that the franchise should have been assessed at one price, the roadbed at another, the rails and ties at another, and the rolling-stock at another. Now, I don't think that the words of the Constitution will bear any construction of that kind. I think that the whole railroad property was required to be assessed as a railroad; that the railroad included the roadway, the roadbed, rails, and rolling stock, and everything which was necessary to make up a railroad. It was a unit, operated as a unit, and intended to be assessed as a unit, and then the assessment to be divided proportionately between the counties.

"That was the only fair way. It was the only way in which an apportionment could be made fairly between the counties, according to the number of miles in each; because it might be that upon the day of the assessment the whole of the rolling stock would be in one county. To assess it where it was would be obviously unjust to others.

"The same plan had been adopted in California in regard to migratory stock—sheep—which were taken to the mountains for pasture during the dry season of the year. They were assessed in one county, but the owner was required to state in what county he expected to take them during a portion of the year. Then certificates were sent from the county in which they were assessed to the county to which they were to be removed, and the proceeds of the tax was divided between the counties where the sheep were pastured; being a portion of the year in one county and a portion in the

other. It was supposed that that was the only fair way of apportioning the value of railroad property; to assess it all as a railroad, and then divide it *pro rata* among the counties, according to the number of miles.

"A suggestion was made by his Honor, which occurs to me right now, as to the plan of collecting this tax; and the question was asked whether they could sell, as the law required property sold for taxes to be sold; it being required to be sold to the person who would take the smallest portion of it and pay the taxes. It was asked how that could be done in regard to railroad cars. The answer to that is just this: It was never intended to cover the case of cars. In California, if a person has no real estate, the Assessor, at the time he makes the assessment, collects his personal property tax. If he has got any real estate, then he gets credit for his taxes upon the strength of his real estate, and the whole tax is charged upon the real estate. Although the personal property may amount to $100,000 and the real estate to $10,000, yet he gets credit upon the whole by reason of his possession of real estate; and the real estate is sold for the whole tax, as well the tax on the personal property as the tax on the real estate.

"So in the case of railroads. If the rolling stock were treated as personal property, and the rolling stock belonged to one person and the railroad to another, the Assessor would be required to collect the tax on the personal property at the time the assessment was made. He might seize and sell it immediately, or enough of it, at least, to pay the taxes. But inasmuch as the owner of that personal property had real estate, he got credit for the whole amount of his tax until the time when it should be declared delinquent, and then the whole would be collected by selling the real estate, if there were a bidder for it. But if, when the real estate was offered, there was no bidder, then the law provided that the Controller might direct the Tax Collector to offer the property but once, and if no *bona fide* bidder would take it and pay the tax, to suspend any further offer, and bring suit against the party for the collection of the taxes. That was the provision of law which applied in all cases where the tax amounted to over $300. Then the assessment was made according to the directions in the Constitution of the State. The Constitution provided that the roadway, roadbed, rolling stock, and franchise should constitute a unit of value. Now, in the assessment that was made in 1880, the Assessors of Sacramento County seem to have gone a little further than was required to be done—or the State Board of Equalization as to Sacramento County. They assessed the whole value of the property, as a unit, at twelve million and some dollars. They then went on further to give the items which went to make up that unit, and in that they set down, 'Franchise, two thousand dollars per mile.' That was simply surplusage, and vitiates nothing. The assessment was perfect and complete without it.

"The State Board of Equalization, on the thirtieth day of April, 1880, assessed, for the year 1880, the Central Pacific Railroad Company for its franchise, roadway, roadbed, and rolling stock in the State of California at twelve million three hundred and thirty-nine thousand four hundred and fifty-six dollars. The entire length of the main track of said railway in said State is 604 miles. The length of main track of said railway in the County of Sacramento is 41 miles. The assessed value per mile of the length of said main track of railway, as fixed by a *pro rata* distribution of the assessed value of the whole property of said company for Sacramento County is as follows: of franchise, two thousand dollars; of roadway, eleven thousand dollars; of rolling stock, six thousand dollars.'

"Then is footed up the amount of the assessment. This separate assessment of franchise, roadbed, and rolling stock was simply surplusage, and did not vitiate the principal assessment which was made, and which would be perfectly complete without it.

"Now as to the apportionment to the counties: that was done according to the exigencies of the Constitution. There was no apportionment by the Board of Equalization to any smaller subdivision. The language of the Constitution, that it was to be apportioned between counties, cities and counties, towns, districts, etc., applies to a state of facts which it was contemplated would arise in the near future. It was the object of a good many of the framers of the Constitution to have a system of township government inaugurated in this State, similar to that which existed in some of the eastern States; that is, to localize as much as possible the government of each particular place. It was supposed, as the Supervisors of a county knew better the wants of that county than the Legislature at Sacramento, that the Selectmen or Trustees of a township would know better the wants of that township, and be better able to apportion the burdens and benefits, than the Supervisors who had charge of the whole county. Therefore, this provision was made: that the Board of Equalization should make this apportionment to counties, cities and counties, cities, towns, townships, and districts, in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, towns, etc. Now there would be obviously a necessity for that thing if these counties were subdivided into smaller collection districts. But there could be no possible utility, no possible benefit, in the State Board of Equalization undertaking to divide the burdens between townships, when there was no separate collector for those townships, and when all the tax payable to the county funds was collected by the Tax Collector and paid into the County Treasury. Of course, no vain thing was required to be done. The object of making this apportionment was to apprise each county, or the authorities of each county, of what proportion of interest they had

in the whole tax, the value of the property which they might assess for county purposes. There could be no possible reason for requiring an apportionment to be made to any smaller subdivision. Of course, after the other section of the Constitution is acted upon, dividing the counties up into townships and organizing township governments, then it would be necessary to apportion the length of the road to each of those townships, because they would have a separate assessment and a separate Tax Collector, and each of the Collectors of those townships would be the agents of the State for collecting the portion of the State tax in that township. But under the present state of affairs, under the state of affairs which has existed all the time when these assessments were made, there was no possible necessity for it; no possible benefit could be derived from it; it would have been absolutely a vain thing to be done.

"MR. JUSTICE FIELD—In some counties there are cities.

"MR. TERRY—Well, in cities and counties it is done. For instance, in the City and County of San Francisco. Wherever the city and county government has been consolidated, then the apportionment was made in that way. In all cases, wherever there was a city and county government, it was apportioned to that city and county.

"MR. JUSTICE FIELD—Take the City of Stockton. That is a city by itself.

"MR. TERRY—That is a city by itself; but then the City of Stockton levies its own taxes. The City of Stockton would not be authorized to levy under the assessment made by the Board of Equalization. They gather their own municipal taxes. They do not collect the State tax.

"MR. JUDGE SAWYER—How do they tax the railroad?

"MR. TERRY—I don't know just how they get at it. They get at it in some way. They tax the little part of the road that is in the municipality, and that is all they do tax.

"MR. JUDGE SAWYER—Is not that embraced in this provision for apportionment by the Board of Equalization? It says counties, cities and counties, cities and towns, doesn't it?

"MR. BROWN—And districts; school districts.

"MR. TERRY—No. The school district taxes are collected by the county. They are levied by the Board of Supervisors, and collected by the county Tax Collector; a separate collection.

"MR. JUDGE SAWYER—Does not this include cities as well as cities and counties?

"MR. TERRY—Cities and counties. Where there is a city government organized, as I said, being a portion of the State, and an agent of the State for the collection of taxes, then the provision would apply to that, and I think that the apportionment was made for the cities. That is my impression. It does not appear whether it was or not. It appears that it was not apportioned to townships. That was made by the County Board. My impression is that where railroads run

through cities the apportionment of the length of the road was given, and the same apportionment to the cities that is given here. But that is a matter about which I am not perfectly informed. It would not appear upon the county roll that any such apportionment had been given. If that apportionment was made, it would be given directly to the city authorities, and would appear upon the city assessment roll. That would come in question when the city was endeavoring to collect the taxes and those taxes were resisted. If that was required to be done, as far as the cities are concerned, then it has been done.

"Under the statute of the State of California we are required to introduce certain evidence. And the law says that when we have introduced that evidence we have *prima facie* established our right to recover. Of course, that is, under the statute of California, a disputable presumption; but it casts a burden upon the other party to do away with that presumption. Having produced that which the law says is *prima facie* evidence of our right to recover, we have established our right, and if no further testimony is introduced we take our judgment. It then devolved upon the defendant, if there was anything wrong in the assessment before the State Board—if their records were not perfect, if everything did not appear upon that record which ought to have appeared upon it—it was incumbent upon them to show it; and the records were in the Court House and were within their reach.

"We all understand what *prima facie* means. We understand it means that if the *prima facie* evidence is not done away with, it entitles the party to judgment. As to their impeachment of it, we never claimed that these parties had not a perfect right to show that no assessment had been made, or no record made of it. The objection we make is that what they show they must show by the record or they must show that there is no record. We say it was not competent for them to produce an individual upon the stand, although he may have been one of the State Board of Equalization, and ask him by what process his mind arrived at a certain valuation. I say you could no more do that than you could in the case of a verdict of a jury call an individual juror to ascertain from him upon the stand what elements he took into consideration to make up the amount of damages he found against the defendant, or than you could go into the mind of a Judge to ascertain by what process of reasoning he arrived at a conclusion in the case. The rule on the contrary has always been, that it makes no difference what reasoning influenced the Judge or the jury; if the judgment is right and can be supported upon any reasoning, then the party is entitled to his judgment and it cannot be overturned.

"Now, it would have been competent for them, if they could show that this valuation was arrived at from wrong

reasoning or wrong premises, to have gone further and shown that the valuation was not the true valuation. They have not shown that. On the contrary, the record in this case, the testimony in this case, shows that their property has not been assessed at anything near its value. They have shown by their own testimony that in building the Southern Pacific Railroad, one of the companies involved here, they issued $39,000 a mile of bonds; $39,000 a mile in bonds in the building of that road and the equipment of it. Now they are assessed $16,500 a mile. They are assessed a little more than half of the cost of their road. They complain that the mortgage has not been deducted from the value of that road. We think that the evidence shows that it was deducted. We think the evidence in this case shows that they had credit for their mortgage. Their mortgage amounts, they say, to thirty odd millions of dollars; they claim in their answer forty-six millions; they say thirty millions and more—thirty-two millions, I believe, is the whole amount of bonds issued. None of them are paid. The interest paid, but not the principal. They had eleven million acres of land, they say, a great deal of which—I don't know but the most of it—is absolutely valuless, lying in an alkali desert. Now put that land at the highest valuation and deduct that from the mortgage and they would have a mortgage of about ten thousand dollars a mile upon the road. The road cost thirty. They are taxed at sixteen. The mortgage has been deducted.

"But we submit that the State of California was competent to adopt a different system of assessment for property according to its use. That where property lay in more than one county, where it was impracticable to have it assessed in pieces by the Assessors of different counties, it was competent for the State to adopt a system which would assess it as a whole, at something like its fair valuation. Your Honor will understand the difficulty which prevailed heretofore, where there were ten or fifteen miles of railroad in one county, and thirty or forty or fifty in another, in valuing it in pieces by different Assessors. The rolling stock might not be valued at all, or might be valued all in one county. And there was a great difference in the estimate of values fixed upon it by different Assessors. The people, in adopting a Constitution, chose to adopt a system which would enable them to value the whole road as a whole. They borrowed it from the State of Illinois.

"Mr. Justice Field—I don't think we hold otherwise. I think it was a very wise thing. The only question is, whether in assessing property they have not adopted a different rule in ascertaining values.

"Mr. Terry—They have adopted no different rule in ascertaining values. They say it must be assessed at its cash value, as other property is assessed at its actual value.

"Mr. Justice Field—But without deducting the mortgage.

"Mr. Terry—No. For the purposes of taxation a mort-

gage shall be treated as an interest in the property. I will get the exact language of the section: 'A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. Except as to railroad and other quasi-public corporations.' Now, I think that the reading of that would be very much improved by a change in the punctuation. As it stands, it reads: 'A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby.' There is a full stop there. We think it ought not to be there. It ought to read: 'Shall be deemed and treated as an interest in the property affected thereby, except as to railroads and other quasi-public corporations.' And then: 'In case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county, city, or district in which the property affected thereby is situate. The tax so levied shall be a lien upon the property,' etc. * * * 'If the tax is paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied upon such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof.'

"Now, what is to hinder the railroad company from crediting this upon this mortgage, if they like; crediting every dollar of the tax that they pay upon this mortgage, and treating it as a payment upon that mortgage? That seems to me to be the effect of a decision by the Supreme Court of the United States in a case which arose in Pennsylvania, in which a tax of five per cent upon the interest paid by railroad companies was assessed against the corporation, paid by the corporation, and deducted in their settlement with their creditors. The creditor brought an action to foreclose the mortgage, treating this as a breach of the condition which bound them to pay the whole amount of interest without any diminution. But the Court said that they had a right to retain this five per cent; that, although levied upon the corporation, it was really a tax upon the bondholders, and the corporation's name was simply used as a convenient means of collecting it; and that having paid it, they could credit themselves with it.

"The point most strenuously insisted upon, on the part of the defendants in the case is, that in the system of taxation adopted by the Constitution and laws of California, an unjust and invidious distinction is made against these defendants in the levying of taxes upon their property; that inasmuch as

the Constitution provides generally that mortgages shall be considered and treated as a part of the property affected by it, and as the general law requires that in assessing property the values of mortgages shall be assessed against the mortgagee, and the value of the residue of the property above the value of the mortgage shall be assessed to the owner, that discrimination has been made against the railroad company. I think that view is not correct. I think that, upon a careful examination of the Constitution and the system of taxation, it will be seen that the difference is only in the manner of assessment, and that the effect of the levy is exactly the same as to the property of the railroad as it is to the property of individuals.

"The section of the Constitution under consideration I will read from Judge Sanderson's brief—Section 4, Article XIII: 'A mortgage, deed of trust, contract, or other obligation, by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby.'

"The section then proceeds to prescribe the manner in which assessments shall be made, but except as to the property of railroads and other quasi-public corporations, the assessment is required to be divided by the Assessor. Where the property was all situated in one county, where the incumbrance was a matter of record in that county, it was not difficult for the Assessor to make that division, to apportion the burden to the holder of the mortgage, and to the mortgagor; but where the mortgage was imposed on lands in various counties, and on property extending through half the diameter of the State, it was not possible for the Assessors to make the division, and assess the share to each in proportion to his interest in the property, for the reason that these debts are fluctuating; they are one sum to-day and another to-morrow. It was a matter of impossibility for the Assessor to ascertain what proportion should be assessed to the holder of the bonds on the first Monday of March of any particular year, and what residue remained to the railroad. And, therefore, the Constitution provided that the whole assessment should be made to the railroad company; but under the provision of the Constitution, under the principles of equity, the general provision making that an interest in property, they would have the right to charge against their creditor the amount which they had paid for the taxes.

"In the case of property belonging to deceased persons, and undistributed, the 3647th section of the Political Code provides that it may be assessed to the heirs, to the guardian, to the administrator, or to the executor; but that any one of those persons may pay the taxes upon it, and when they have so paid the taxes upon it, they charge the others with their proportion of the interest. Now, the Constitution provides that these taxes may be paid either by the holder of the mortgage or by the owner of the property; and, if paid by the

holder of the mortgage, he has a lien upon the property for the repayment of the same; and, if paid by the mortgagor, it is a payment of his debt *pro tanto*.

"MR. JUSTICE FIELD—Does that clause apply to corporations?

"MR. TERRY—I think so. I think it applies to everybody. Suppose that the clause did not in so many words provide it, would not the equitable principle come in? Your Honor and I own a piece of property, as tenants in common. There is a lien upon that property; the property is about to be sacrificed in satisfaction of that lien. I am absent or indisposed to attend to it. Your Honor pays off the whole lien and relieves the property from the burden. Would not any Court of equity decree that I should pay you back the proportion of the money which was required as my part for the removal of that burden? If you and I own a piece of property which is taxed, and you are absent, and I pay the tax, does that relieve you of obligation to repay to me the portion of the tax? Or, suppose a part was assessed to you and a part assessed to me, and I pay the whole tax, would not any Court of equity decree that you are bound to pay me back the amount which it took to relieve your portion of the property from that lien? And would I not have a right to hold a lien, an equitable lien, upon the property, for what I had paid?

"Now, that proposition is laid down by the Supreme Court of the United States in three cases. One is the case in 6 Wallace, page 15, *Haight* vs. *The Railroad Company*. Another is in 7 Wallace; and the third, which I will read, and which reviews the other cases, is in 17 Wallace, 322. It is the case of *The United States* vs. *Railroad Company*.

"This case arose upon the identical 122d section of the Internal Revenue Act of 1864, as amended by that of 1866. This was an Act of the United States imposing a tax of five per cent upon all railroad corporations, or corporations which issue bonds—five per cent upon the amount of annual interest which they paid upon the bonds were required to be paid to the Government as taxes. That levy was resisted by this railroad company. One ground of the resistance was, that it was an assessment against a creditor, and, therefore, could not be permitted; the next was that the City of Baltimore—a municipality, which was the creditor—was not subject to taxation. Mr. Justice Hunt delivered the opinion of the Court. The statement of the case is: Section 122 of the Internal Revenue Act of 1864 provided: 'That any *railroad*, canal, turnpike, canal navigation, or slackwater *company, indebted for any money for which bonds or other evidence of indebtedness have been issued, payable in one or more years after date, upon which interest is stipulated to be paid*, or coupons representing the interest, or any such company that may have declared any dividend in scrip or money due or payable to its stockholders, including non-residents, whether

citizens or aliens, as part of the earnings, profits, income, or gains of such company, and all profits of such company carried to the account of any fund, or used for construction, *shall be subject to and pay a tax of five per centum on the amount of all such interest* or coupons, dividends, or profits, whenever and wherever the same shall be payable, and to whatsoever party or person the same may be payable, including non-residents, whether citizens or aliens.'

"That was a tax levied upon the company itself; not in the name of the creditors, but levied on the company itself, as this tax is levied upon this railroad company. There was a proviso in the same section that they were authorized to deduct that in their settlement with the creditors. And the Court, Justice Hunt, said:

"'The defendants insist:

"'*Firstly*—That the section in question does not lay a tax upon the corporations therein named, and by whom the tax is payable, upon their own account, but uses them as a convenient means of collecting the tax from the creditor or stockholder upon whom the tax is really laid.

"'They insist, as a consequence:

"'*Secondly*—That the present is a tax upon the revenues of the City of Baltimore. And,

"'*Thirdly*—That it is not within the power of Congress to tax the income or property of a municipal corporation. 1. The case of *The Railroad Company* vs. *Jackson*, 7 Wallace, 262, decided in 1868, and *Haight* vs. *Railroad Company*, 6 Wallace, 17, are authorities in support of the first proposition, that they were used as a convenient means of collecting the tax from the creditor.

"'In the case first mentioned, Jackson, an alien non-resident, sought to recover from the railroad company the amount of the tax of five per cent imposed upon the interest of bondholders by the Act of 1864, and withheld by the company. A similar tax was imposed by the statutes of Pennsylvania. The plaintiff claimed that as he was an alien non-resident it was not in the power of Congress or of that State to tax him. The Courts of Pennsylvania had sustained the deduction. Mr. Justice Nelson, in delivering the opinion of this Court, and in remarking upon the decision of those Courts, 'that the deduction from the prescribed income of the interest on these railroad bonds, when paid by companies, was regarded as simply a mode of collecting this part of the income tax,' says: 'We concur in this view. It is not important, however, to pursue this argument, as Congress has since, in express terms, by the Acts of March 10 and July 13, 1866, imposed a tax on alien non-resident bondholders. The question will be hereafter, not whether the laws embrace the alien non-resident holder, but whether it is competent for Congress to impose it.' In *Haight* vs. *Railroad Company*, it was held that a covenant by the corporation issuing the bond to pay the interest, 'without any deduction

to be made for or in respect of any taxes, charges, or assessments, did not relieve Haight, who was a bondholder, from the deduction of the five per cent authorized by the one hundred and twenty-second section.'

"'It was the application of those bonds to pay the full amount of interest without any deduction on account of any taxes, burdens, or charges; but that did not relieve him of the imposition of five per cent by the United States.

"'The Court below said that 'the measure of the company's liability is expressed in the bond as being debt and interest only. It has nothing to do with the taxes which the Government may impose on the plaintiff for the interest payable to him. The plaintiff pays no internal revenue tax on these bonds at his place of residence. It is, therefore, no case of double taxation. The tax should be paid somewhere; and it was to meet investments like this, in banks, railroads, etc., that the one hundred and twenty-second section was passed.' This opinion was adopted in this Court, Mr. Justice Grier saying: 'The facts in this case are correctly stated, and the law properly decided by the learned Judge of the Circuit Court.'

"'Now, the Judge proceeds to say: 'This is a clear, distinct, unqualified adjudication, by the unanimous judgment of this Court, that the tax imposed by the one hundred and twenty-second section is a tax imposed upon the creditor or stockholder therein named; that the tax is not upon the corporation, and that the corporation is made use of as a convenient and effective instrument for collecting the same. It is a sequence in logical connection with that provision of Section 117, which specifies as the subjects of individual taxation all the earnings, profits, gains, and income from whatever source derived, and whether divided or not, *except* the amount derived from the sources indicated in the one hundred and twenty-second section. Of the incomes specified in Section 117, the individual must make specific returns, and be directly taxed thereon. Upon or for the incomes received from the sources mentioned in Section 122 no tax is directly imposed upon the owner. That tax is to be returned by, and collected from, the corporation, as his agent and instrument. A tax is understood to be a charge, a pecuniary burden, for the support of government. Of all burdens imposed upon mankind, that of grinding taxation is the most cruel. It is not taxation that government should take from one the profits and gains of another—that is, taxation which compels one to pay for the support of the Government from his own gains and of his own property. In the cases we are considering, the corporation parts not with a farthing of its own property. Whatever sum it pays to the Government is the property of another. Whether the tax is 5 per cent on the dividend or interest, or whether it be 50 per cent, the corporation is neither richer nor poorer. Whatever it thus pays to the Gov-

ernment it by law withholds from the creditor. If no tax exists it pays 7 per cent, or whatever be its rate of interest, to its creditor in one unbroken sum. If there be a tax it pays exactly the same sum to its creditors, less 5 per cent thereof, and this 5 per cent it pays to the Government. The receivers may be two or the receiver may be one, but the payer pays the same amount in either event. It is no pecuniary burden upon the corporation, and no taxation of the corporation. The burden falls on the creditor. He is the party taxed.'

"Now, I say that is the effect of the system adopted by the State of California. Because, if they had not adopted this system in dealing with the affairs of this company, it would be absolutely impossible, in the nature of things, for the agents of the State, the State Board of Equalization, to properly adjust the burdens between these parties who own joint interests or common interests in this property. But the parties may adjust it themselves, and without difficulty. So that in the case of heirs of an estate there may be a dozen, and there may be twenty, and they may have divers interests; and one comes forward and pays the tax, and the others are bound to him for their proportion of it.

"Another common instance in the history of this country: There were large grants of land claimed under concessions from the Mexican Government before this country was acquired by California. Before the title was settled, before the patent issued from the General Government, numerous deeds for different pieces of land were given by the claimants under those concessions. The United States Government, in giving those patents, did not undertake to adjust those interests at all. It gave the patent to the original claimant, and said: 'Now, adjust your interests among yourselves. Here is the land given to the man to whom it was ceded. Now, you who have claims to portions of it, assert your claims through the proper tribunals, or settle it among yourselves. It would require too much labor and too much patience for us to take the trouble to make the adjustment between you.'

"Now, the State of California, seeing the utter impracticability of making this adjustment of burden between the holders of the bonds and the holders of the property, have chosen to use this corporation as a convenient means of collecting the tax. The State says: 'We assess it to you. You pay the tax and deduct it from the amount of your indebtedness. Adjust that between yourselves. If you can agree upon it, do agree upon it. If not, the Courts are open for adjustment.'

"I say, then, that a construction can be put upon this Constitution of California which avoids any discrimination, which makes the burden fall equally upon all, in proportion to their ability to pay; in proportion to the property that they hold; in proportion to the protection which they receive from the Government. And even if there were no provision directly made in the Act for the repayment of the taxes,

which, by the Constitution itself, has been made a charge and a lien upon the interest which these creditors hold in the land, which interest will be sacrificed in default of payment by a sale of the property, which will deprive them not only of their property but of the security, there being a direct provision in the Constitution—and properly considered, I think there is a direct provision—that any Court would compel this party to repay to his debtor the amount which that debtor had expended in removing the lien or incumbrance from that property.

"Now, the Constitution proceeds—that same fourth section, Article XIII: 'The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property so affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof; *provided*, that if any such security or indebtedness shall be paid by any such debtor or debtors after assessment and before the tax levy, the amount of such levy may likewise be retained.' If he is called upon before he has paid the tax, after the assessment has been made, he may be still made to pay the amount of money which he will be called upon——

"MR. JUDGE SAWYER [interrupting]—The difficulty is that the Constitution applies to everybody except railroads.

"MR. TERRY—No; it applies to everybody. They are making a false clamor. They are complaining of everything. We contend that that section, properly considered, applies to everybody. 'A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby.' That is of universal application. There is a tax levied upon the whole property. There is no tax levied upon the mortgage. Under the first clause of that section of the Constitution the property belongs in part to one and in part to another. The Constitution so provides that it is deemed and treated as an interest in the property affected by it. Then the holders of those bonds have an interest in the property to the extent of the value of their bonds. The holders of the stock of the railroad company have an interest in the property to the amount of the residue. Now, that is impossible of adjustment, because, as I say, these debts are increasing and diminishing. They are one thing at one time, and another at another. The bonds are put in a lump and sold; and it is very much easier for the railroad company and their creditors to adjust the proportion of the burden than it would be for the Assessor. It would be an impracticable work for the State to make that adjustment. But it would be easy of ascertainment by the railroad company. They know exactly what

the amount of their indebtedness is upon the first day of March of each year. The first Monday of March, when these taxes are levied, they can then adjust the burdens of their creditors when they settle with them, without throwing this duty upon the State. And I cannot for the life of me see the difference——

"Mr. Judge Sawyer [interrupting] - The trouble of it is that they are excepted by the very introductory words, 'except as to railroads.'

"Mr. Terry—That is as to the manner of assessment merely. That is not as to the interest in the property. That part is broad enough to include everybody—corporations and everybody else. But it is only as to the manner of assessment that a difference is made. When it comes to assessing them you shall do it all in the name of one of the parties in interest. Just as the Legislature might provide that in a partnership, if there were a resident partner and a non-resident partner, that it should work no hardship upon either of the two, that the whole assessable property should be assessed to the resident partner, and if the resident partner paid the taxes he would have a right to recover it back in the settlement of his account with the other partner. There would be no difficulty in that; there is no difficulty in arranging these matters between the parties. They have, in truth, agreed that they would pay those taxes. It was suggested that they might have changed that agreement. If they have changed it, they can arrange among themselves the money which has been expended to prevent the sacrifice of the estate.

"Mr. Justice Field—I do not see any constitutional objection to the Legislature providing that the property of joint tenants or tenants in common shall be assessed to the party in possession. I do not see that it would work any harm or violate any constitutional right. I suppose they might assess property without reference to its owners, as so much property.

"Mr. Terry—Certainly; it is simply a matter of identification.

"Mr. Justice Field—It is only when they come to bring an action like this, for personal judgment, that we must discover who is personally under obligation to pay it.

"Mr. Terry—The United States brought action for personal judgment against a railroad company for the payment of taxes levied upon its creditor, and the Supreme Court of the United States unanimously said they should pay it.

"Mr. Justice Field - The case you refer to has often been before us. You will find that we have given very full consideration to that case. It was held that the tax was not, in fact, upon the corporation, but that it was a tax upon the creditors.

"Mr. Terry—That is exactly what I say here. That is the purpose of it. We contend that this tax is not a tax upon this railroad company. It is not a discrimination

against this railroad company. It is a tax to the extent of its indebtedness, a tax upon its creditor; and the railroad company is merely used as a convenient means of collecting the tax. That is exactly the point for which I cite that case.

"Now, objection is made that there is discrimination in the manner of assessment. I do not think there can be anything in that. It has been decided several times in the State Courts, and in the Supreme Court, that a Board might be established for the assessment of property which extended through various counties, property which it was impossible to assess by local assessment. I think it not necessary to dwell upon a proposition like that. The State Board of Equalization in acquiring information as to the amount of property which they are called upon to assess, in the first place, pursue precisely the same course that the County Assessor does in arriving at the value of the property. He calls upon the party for a statement of his property subject to taxation. He calls upon him, and the information which he is required to give is exactly the same information which any citizen is required to give when called upon by the Assessor. And from the information so derived, and any other information within the reach of the Board of Equalization, they arrive at the value of the property. I cannot see any hardship that there is in having the valuation of property so stated determined by a Board elected by the people of the whole State, or by the people of districts, rather than by local Assessors in piecemeal, each Assessor elected by the citizens of his particular county. It is objected, too, that the provision of the Constitution, Section 10, Article XIII, which required an apportionment of the taxes levied to counties, and to subdivisions of counties, has not been complied with.

"Mr. Justice Field—I believe it is admitted that there are no subdivisions except cities.

"Mr. Terry—There are none. No taxing districts in the county. There are no taxing districts except cities which collect any portion of the county taxes; of the State and county taxes.

"Mr. Brown—Will you allow me to interrupt you?

"Mr. Terry—Yes, sir.

"Mr. Brown—There are school districts and road districts, and in any school district there may be a special tax for a school house; or in a road district there may be a special tax for a bridge, and in such cases the taxes in those districts would be different from those in another part of the county.

"Mr. Justice Field—Do you contend that the railroad company would be in any way affected by that? I do not see how the apportionment into districts would affect the railroad company.

"Mr. Brown—Certainly; because the tax would be collected from that portion of the road which ran through that

district. It might just touch the district, or it might run ten miles in the district.

"MR. TERRY—Well, all those taxes are levied by the Board of Supervisors, and all those taxes are collected by the County Tax Collector.

"MR. WIGGINTON—A special school tax would not be levied by the Board of Supervisors. They have nothing to do with it.

"MR. TERRY—A special school tax is levied by the Board of Supervisors and collected by the County Tax Collector, and apportioned to the different school districts by the Board of Supervisors.

"MR. BROWN—Your Honor will perceive the importance to the defendant. If the railroad does not run through a certain road district or school district, your Honor, there is no tax. If it runs only a short distance, the tax might be for a long distance, and it might be very heavy.

"MR. TERRY—The railroad runs so many miles through the county. The county have to do with that number of miles. They levy their tax upon that number of miles, and it is no business of the railroad as to whether one school district gets a little more than another school district or whether it gets a little less. The number of miles of railroad in the county is given; that and the value per mile is given; that is the amount with which the county has to deal in making their assessments—the valuation of the number of miles of road running in that county. Whether the tax after it has been collected is equitably divided between the school districts, is a matter with which nobody has any concern. At least, nobody before this Court has any concern about it.

"MR. JUDGE SAWYER—Well, suppose the railroad runs forty miles through a county and through a certain school district one mile, the school district would not be entitled to a tax on the forty miles?

"MR. TERRY—That school district has no right to levy a tax upon one foot of it.

"MR. JUDGE SAWYER—The Board of Supervisors have no right to levy a tax on that forty miles for the benefit of that school district. They have no authority whatever to levy a tax on forty miles running through that county for the benefit of that district.

"MR. TERRY—There is no evidence here that any tax has been levied upon this road for the benefit of any school district. When we imagine that public officers are public robbers, we may imagine any sort of an outrage they may commit. But the presumption is, that the public officers do their duty.

"MR. JUDGE SAWYER—But what we are trying to do is to get at the effect of this law.

"MR. TERRY—I say the Constitution meant simply this: It was adopted in contemplation of the division of counties into townships and smaller subdivisions. It was adopted in

contemplation of the probability that various counties in the State would avail themselves of this permission of constituting themselves an organized system of town governments to localize legislation as much as possible. And when that would be done, of course each of these small subdivisions of this county would be one district. They would levy a tax for county purposes. And when that was done whatever proportionate amount was due from each division would be paid, and not before. It would be a vain thing if done before that.

"Now, the provision for the levy of school taxes is in Section 1837 of the Political Code, which reads as follows:

"'The Board of Supervisors must, at the time of levying the county taxes, levy a tax upon all the taxable property in the district voting such tax, sufficient to raise the amount voted. The rate of taxation shall be ascertained by deducting fifteen per cent for anticipated delinquencies from the aggregate assessed value of the property in the district, as it appears on the assessment roll of the county, and then dividing the sum voted by the remainder of such aggregate assessed value. The taxes so levied shall be completed and entered on the assessment roll by the County Auditor, and collected at the same time and in the same manner as State and county taxes; and, when collected, shall be paid into the County Treasury for the use of the district in which the tax was voted.'

"Section 3665 of the Political Code reads as follows:

"'The assessment made by the County Assessor and the State Board of Equalization shall be the only basis of taxation for the county, or any subdivision thereof, except in incorporated cities and towns, and may also be taken as such basis in incorporated cities and towns when the proper authorities may so elect; all taxes upon townships, roads, school, or other local districts, shall be collected in the same manner as county taxes.'

"The Boards of Supervisors can ascertain and are able to ascertain much better the number of miles of road in each particular school district than the State Board of Equalization. They form the school districts and remodel them as they please, and abolish them, and add to them, and take from them.

"Another objection made is, that the roadbed, franchise, rolling stock, and roadway is assessed as a unit, and not in separate parcels. To my mind, that is the only possible way at which a fair conclusion can be arrived at. They all go to make up a railroad. They are all used for that business exclusively. They are of no value for any other purpose in the world. As well might the wall, the roof, and the sleepers of a house be required to be assessed separately, and the valuation of each given in separate items, as the roadbed, roadway, and rolling stock of railroads. None of them have any value except in that connection. The roadbed, the embank-

ments, or the cuts have no possible value for any other use in the world. The rolling stock detached from the road is of no value. It is of no value without the franchise.

"It has been asserted that a franchise is not property; that it is of no value. In the first place, I contend it is competent for the sovereign of any State or community to say in what property shall consist. I think there is no other title to property; that nothing is property except what has been declared by law to be property; and that everything is property which the law says is property. There is no other way of arriving at it. Why, years ago, when the institution of slavery prevailed, property in human beings was permitted in some of the States. In some States it was real property, required to be passed by deed or by an instrument under seal, that instrument to be recorded at the place of residence. In others it was personal property, transferred simply by delivery of the chattel.

"Mr Terry—The law designates what is real property and what is personal property. Take, for instance, common law. What did real property consist in? It consisted in the land itself, and in anything which could not be removed from the land without disturbing the soil. Any superstructure erected on top of the ground, whether it rests upon the ground or rests upon posts, is in California declared to be real estate. And it is real estate, because the law has so declared it.

"Now, a franchise is said to be of no value. Of what value would this property be to-day without a franchise? From the franchise they derive their right to own property; they derive their corporate existence; they derive their right to collect toll; their right to construct the road; their right to operate the road; their right to appear in these Courts and defend a case brought against them. The right to sue and be sued is one of the rights which they have acquired by virtue of the franchise given to them by the State. And it seems to me their franchise is of more value than all the rest of the property, because, without it, it would be of no utility whatever.

"Again, another advantage they have derived. They have derived the right to carry on this business, to make a profit on it without incurring the responsibility that I would incur if I undertook to carry on, in connection with any other individual, the same business. Their liability is limited by law. They are responsible only to the extent of their interest in the corporation; the extent of the shares that they own. Whereas, in the case of individuals carrying on the same business, each individual is responsible for every cent of all obligations incurred. And, for that grant, the railroad corporations are liable to be assessed for the power to exist, and to hold property, and to carry on business.

"It is admitted here that the State might impose a burden upon a corporation which is not imposed upon an individual,

as a condition to their continuing to exist as a corporation. They admit that those burdens might be imposed which cannot be imposed on individuals. Now, if this be a discrimination, what is it except a condition to the existence of the corporation? Could not the State say to corporations: 'We will allow you to form corporations for these purposes. To transact this character of business, we will give you the advantage of limiting each individual's liability; we will give you the right of eminent domain; we will give you the right to cross the public lands, and to cross public highways; but we exact, as a condition, that you shall pay double the amount of taxes which individuals pay who have no privileges of this kind.' Under the admissions made by counsel, if that be laid as a condition in the act of incorporation, it would be in the power of the State to enforce it, and would not be a violation of the Fourteenth Amendment. They say that an unequal tax upon its property is a different thing; that when you undertake to assess the property of the corporation you must assess it just exactly as you do the property of individuals; but that you may impose any burden you please upon a corporation as a corporation as a condition to its existence. Well, now, if that might have been contained as a provision in the corporation law as a prerequisite to corporation at all, why may it not be imposed as a condition to their continuation of existence? If the Constitution has the effect of amending the corporation laws, it must be given that effect.

"There is another proposition. They object that the assessment of this railroad property is fatally defective because there is no sufficient description given of the property taxed. And they read from certain sections of the Political Code giving directions to local assessors as to the assessment of property in the counties, which says that real estate, and the improvements thereon, are to be separately assessed, and one of the counsel contended, with some degree of gravity, that the roadbed and the roadway was real estate, that the rails and ties were personal property, therefore that there should have been an assessment of the value of the roadway and the roadbed, and another assessment of the value of the rails and ties.

"Now I say that, under the rule adopted in California, the roadway, roadbed, rolling stock, and everything else, is neither real nor personal property; it is a class by itself. The law has a right to classify property as it pleases, to designate arbitrarily what is real, and what is personal, and what is mixed; and they have chosen to fix this in a class by itself; to classify it by itself according to its use. It is of no value for anything else. The whole thing together goes to make up the thing which is useful, and which is used, and therefore, it has been fixed in a class by itself. It partakes both of the nature of real and personal property.

"Mr. Judge Sawyer—I did not understand that they claimed that it was real estate. They claimed that it was

improvements, and they cited the Kearny Street case to show that it was improvements.

"MR. TERRY—They claimed that the roadbed should be assessed as real estate, and that the rails and ties should be assessed as personal property; as improvements.

"MR. JUDGE SAWYER—Not as personal property, but as improvements.

"MR. TERRY—Yes, as improvements. Then, of course, the rolling stock ought to be personal property. It is not affixed to anything; but I say that the whole thing has been put in a class by itself. It goes to make up the whole just as the fixtures in a house are a part of the house.

"MR. JUSTICE FIELD—You treat it in this way: Supposing the law had said that railroads should be taxed at their value, but in estimating the value they should take into consideration the rails and roadbed, and roadway, and therefore, that it was clear that railroads should be taxed in that way?

"MR. TERRY—Yes, sir; that is what I say; that it is the railroad which is taxed, and that the tax includes everything which goes to make up the road.

"MR. JUSTICE FIELD—On the same principle, where they tax a house, they would not separate the fixtures that are attached to it.

"MR. TERRY—Certainly not. Nor would they tax the roof or the floor separately.

"MR. JUSTICE FIELD—That suggestion strikes me with a good deal of force.

"MR. TERRY—Of course, the Constitution and laws must be interpreted together. The whole instrument must be read. And it is clear that the object of the framers of the Constitution and of the adopters of the Constitution intended by the language of that instrument, to take these railroads from the category of real and personal property, and to tax them in a class by themselves. The depots, buildings, machine shops, are treated as property, all being classed in a separate class from the rest of the railroad property, and assessed by local Assessors; but the roadbeds and other property are assessed as a whole; they are mixed property; they are neither real nor personal property, but they partake of the nature of both.

"In regard to the description given by the Constitution for identification: that is what the statute requires. Section 3664 says that in assessing property, it must be done by metes and bounds, or some description sufficient for identification. Well, now, the railroad commences at the City and County of San Francisco and goes to the eastern boundary of the State; giving its name and giving that statement of its location, is a sufficient description for all purposes of identification. Every man, woman, and child in the State would know what was meant.

"MR. JUSTICE FIELD—You could not find, very well, any other Central Pacific Railroad.

"MR. TERRY—Exactly. It has been often decided that a description of a tract of land which is usually made by metes and bounds, is sufficiently described, if it is named by the name by which it is known. It is not necessary to say whether it contains ten acres or ten thousand acres. You can give its well known name without giving any other description whatever. That description would be sufficient in a deed conveying the property. It would be sufficient in the levy of an execution, sufficient in a Sheriff's deed. Therefore you would have no difficulty in finding the Central Pacific Railroad if you wanted to levy upon it, if it was merely described by its name.

"Another objection which is made is, that there should have been some sort of a description of the cars. The gentleman says there is no sufficient description of the cars; that the description, 'so many cars,' does not mean anything; that that does not describe it.

"MR. JUDGE SAWYER—It don't say so.

"MR. TERRY—How do we know it don't say so? If the law requires it, we say it does say so. We have not introduced the record of the Board of Equalization as to what that assessment was. We have introduced a statement which they made as to the amount of assessable property—as to the number of miles and the value of it. The law says that that is *prima facie* evidence. Now, if it was necessary to say so many acres bounded so and so, that has been done. The burden was upon them to show that it had not been done. The record was here in the Court House. The law makes that record *prima facie* evidence, and we have made out our prima facie case.

"MR. BROWN—Our point is this, that there was no assessment at all.

"MR. TERRY—The assessment has not been produced. Your Honors have not been allowed to look at the assessment, and you do not know what it contains. All you do know is that we have introduced a paper which the law says is *prima facie* evidence that the assessment was properly and legally made in every respect; that every 'i' was dotted and every 't' was crossed. The burden was upon them to show that it had not been done just exactly as the law required. Now, I don't care how the gentleman claimed it was done. I say we have proven in this case that it was done just as it ought to have been done. The assessment did not require, anywhere, to be sent to the county. The assessment must be made at a certain time. And when it is made, all that is required to be done is to send to the different counties a statement that the assessment has been made; that the value is so much per mile, and that so many miles are in your county, and therefore so many thousand dollars' value are for you to tax up for your county purposes. And that statement is to be entered upon the assessment roll of the county; that statement, and nothing else. And that statement was

entered upon the assessment roll of the county, and that statement was produced here.

"MR. BROWN—We rely upon Subdivision 12 of Section 3650, that 'the assessment of the franchise, roadway, roadbed, rails, and rolling stock of any railroad as apportioned to his county by the State Board of Equalization——'

"MR. TERRY [interrupting]—Subdivision 12. That is a good subdivision. I have been reading it. I have got it here now. Now, that means just this: He is to enter there the amount of State taxes on that number of miles of road, and the amount of county taxes on that number of miles of road. That is what he has got to put on his assessment. That is, the proportion of the assessment reported to him by the State Board of Equalization. And that is what he must put in his assessment. He must carry out the whole amount of State and county taxes assessed against that proportion of the road which was reported to him by the State Board of Equalization to be assessable in his county.

"MR. WIGGINTON—The law provides that the Auditor shall do that. The Assessor has nothing to do with it.

"MR. TERRY—Well, he must enter up the assessment; no matter how he does it. It is entered upon the assessment book; no matter whether under the Assessor or under the Auditor. It is upon the assessment book of the county, that the measure of obligation of each citizen property holder in that county, to pay his rate of taxation, is found.

"MR. BROWN—Our position is this: that the copying of this letter is no assessment. What we insist upon is that the assessment, as made by the State Board of Equalization, should be entered upon that book; but without that there is no evidence whatsoever of any assessment, and it is not an assessment.

"MR. JUDGE SAWYER—You mean that a copy of the assessment should be transmitted?

"MR. BROWN—No, sir; what I mean is that the assessment made by the State Board should be entered upon those books as the assessment; that here they have simply entered a letter from the State Board to the local Assessor, and that is all. It has no element of assessment; it may be a statement required under another section, but it is not an assessment.

"MR. TERRY—The assessment is in the records of the State Board of Equalization where it belongs. It is never sent out. All that the county has anything to do with is the proportion of the value of that road with which they can deal for county purposes. The State Board of Equalization fixes the number of miles of road in their county, and the value of it, and says: 'Now, gentlemen, you have got so much money to add to your assessment list for the purposes of fixing the amount of your county taxes to raise the necessary revenue. Here is this railroad in your county—ten miles of railroad at ten thousand dollars per mile—one hundred thousand dollars. Add that valuation, and then go on and fix your amount.'

This statute must be construed together; and, when you undertake to determine what the County Assessor is required to spread upon his assessment book, by the twelfth subdivision of Section 3650, you must find out what it is he receives; because, he cannot spread anything upon his book that he has not received.

"Now, Section 3664 tells just what he must receive. Commencing at the bottom of the left hand page: 'On or before the fifteenth day of May, in each year, said Board shall transmit to the County Assessor of each county through which any railway, operated in more than one county, may run, a statement [not a copy of any statement, but a statement, showing what?] showing the length of the main track or tracks of such railway within the county, together with a description of the whole of said tracks within the county, including the right of way by metes and bounds, or other description sufficient for identification.'

"Now, that is all that they are required to send him. What can he put upon his books except that which he receives from the State Board? In determining what the twelfth subdivision of Section 3650 requires him to spread upon his books we find provided as follows: 'The assessment of the franchise, roadway, roadbed, rails, and rolling stock of any railroad, as apportioned to his county by the State Board of Equalization.'

"MR. JUSTICE FIELD—That means the value, does it not?

"MR. TERRY—Yes, sir; assessed by the Assessor. It means that he is to spread upon his book a statement which he is to receive from the State Board of Equalization: that is, that there are so many miles of road in the county, and that it is worth so much a mile.

"MR. WIGGINTON—Do I understand you to say that that is the assessment?

"MR. TERRY—No, sir; no, sir. I say that the assessment is on the record of the State Board of Equalization, and nowhere else.

"MR. WIGGINTON—What does Subdivision 12 mean when it says he shall put the assessment on the roll?

"MR. TERRY—As apportioned to his county. It means just exactly what it says, that he shall put down ten miles of road, worth twenty thousand dollars a mile—two hundred thousand dollars—to predicate his county levy upon. That is all that it does mean; that is all that it could mean. There would be no sense, no reason, in requiring a full transcript of this assessment to be made out and sent to the Assessors of the different counties. There would be no use to be subserved, no useful purpose. They cannot revise it; they cannot increase or diminish it. All that they have got to do is to take the number of miles and the valuation as affixed, and assess it for county purposes at the same valuation and at the same number of miles.

"I was going to say that it would be a matter of absolute

impossibility for the State Board of Equalization to transmit such documents as these gentlemen say are required. In the first place, one of them claims that they must describe the roadbed by metes and bounds—that they must describe every particular subdivision of land in it; that they must describe the cars by a description sufficient to enable anybody to identify them; that they must assess the road as real estate; that they must assess the rails and ties as improvements upon the real estate; and between the last Monday in April and the fifteenth day of May, they must make thirty or forty transcripts of that to send to the various Assessors of the counties. That would be an absolute physical impossibility with the clerical force that they have. They have only one clerk, and he could not do the work in six months that they would require him to do in a week if their theory of the manner in which this thing is to be done, be correct. And the County Assessor would have nothing to do with it when it got there, because he has nothing to do with any part of the road except that which falls within his county.

"MR. JUSTICE FIELD—There are a great number of cases where property consists of very many parts and where it is not necessary to enumerate specifically those parts in a deed, or even where an execution is levied by a Sheriff. If you give a deed to a house with all the furniture in it, would not that deed be sufficient to pass the furniture in it?

"MR. TERRY—And it would be a good specification for taxing.

"MR. JUSTICE FIELD—That is what I was going to say, then if the Sheriff should sell the house and all the furniture it would not be necessary for him to describe in detail the particular items.

"MR. TERRY—Certainly not.

"MR. JUSTICE FIELD—Then on the same principle, why would not a conveyance of railroad property, including in general terms the rolling stock, carry all the cattle cars as well as all the other cars that were in possession of the company?

"MR. TERRY—I say that that is the law.

"MR. JUSTICE FIELD—And if so, why would it not be good not only in a mortgage, but for taxes? The rule is, after all, that you must describe the property so that you can identify it, and the identification must be not necessarily by the description itself, but by the description taken in connection with the circumstances in which the property is placed, as, for instance, the furniture in a house. That is sufficient identification for you to go into the house and take the furniture. Is there not always connected with railroad cars a mark so that in some way they can be identified?

"MR. TERRY—Always.

"MR. BROWN—Will you allow me to answer that suggestion? A man might have any amount of stock upon a ranch or farm and, by a general bill of sale he might sell all that

property, unquestionably; but when it comes to the taxation of that property, he is entitled by the statute to have that property specified; and, until it is specified, there is no mode known to man by which he can obtain any relief whatsoever. In case a tax is levied upon him by a lumping assessment, and a suit is brought against him, if the tax is good, although they may have assessed ten times the amount of the property that he owned, yet he has no relief; while, if the assessment is specific, so many thousand head of sheep, or so many thousand head of cattle, or so many hundred head of horses, and the assessment is greater than the property that he owns, he has a perfect defense against that surplus assessment.

"MR. TERRY—The object is, I suppose, to identify the property. I do not think that any assessment was ever made, or ever will be made, to meet the gentleman's views. He says that although the conveyance of a farm with a thousand head of cattle thereon would be sufficient to transfer the cattle and property, yet, when those cattle come to be assessed there must be a more particular assessment; therefore, the assessment must say: 'One red yearling bull, valued at ten dollars; one white heifer, valued at five dollars.'

"MR. BROWN—That enumeration is specially provided against.

"MR. TERRY—Very well. Now, then, where is there any necessity for any enumeration of cars? The rolling stock is put down at so much. What is the necessity of putting down so many passenger cars, and so many freight cars, and so many box cars, and so many flat cars, and so many baggage cars?

"MR. JUDGE SAWYER—The whole question, I think, depends upon the construction of the Constitution. The Constitution prescribes what shall be done. If it requires something more than a general description, as a farm by a certain name, you have got to follow it. So, it comes right down to the question, What does the Constitution require?

"MR. TERRY—Exactly. And I say that, so far as the argument in this case is concerned, I do not care what the statute requires. Whatever the statute requires in this case we have done. We have introduced a paper which the law says is *prima facie* evidence of our right to recover; that means that we have proved enough to authorize and to require the Court to presume that this assessment was made precisely as the statute required it to be made; and, if anything was wrong, the proof should have come from the other side. We have made a *prima facie* case that the assessment was made just exactly as the statute required it to be made; and there has been no proof to the contrary. Then, if it was necessary to put down 'one box car, number so and so, and another one number so and so,' that has been done, and the records of the State Board of Equalization will show it.

"MR. JUSTICE FIELD—Undoubtedly your position is cor-

rect, that what you have produced is generally *prima facie* evidence of right to recover. The law is, that you have established a *prima facie* case.

"MR. JUDGE SAWYER—The very point is that it does not show it.

"MR. TERRY—The Court has not been allowed to see what the assessment does show. The objection is to the insufficiency of the statement that was sent by the Board of Equalization.

"MR. BROWN—No, our objection is that the assessment made by the State Board was not entered upon the assessment roll of the county.

"MR. TERRY—My reply is, that no law ever required that.

"MR. JUDGE SAWYER—That is a question of construction of law.

MR. TERRY—My proposition is that there is no law that required any such thing to be done. The law required simply that the State Board of Equalization should transmit a statement of the number of miles and the valuation of the road in that county, and of the proportion which that county was entitled to receive of the whole valuation, or entitled to deal with the whole valuation. That has been decided by the Supreme Court of this State in two cases. This case of *The San Francisco and North Pacific Railroad Company* vs. *The State Board of Equalization* is found in 60 California. The portion which I read is on page 33: 'The order of assessment does assess separately the franchise, roadway, roadbed, rails, and rolling stock—the several subjects of taxation mentioned in the Constitution and Code. (Article XIII, paragraph 10; Political Code, paragraph 3692.) It is not necessary, therefore, to determine whether it is obligatory on the Board separately to specify the several items of railroad property. The Constitution does not in terms require that the assessed value of each item should be separately *apportioned* to the several counties, and that the Political Code does not contemplate such separate division is sufficiently apparent from Section 3650. That section provides that the Assessor shall prepare an assessment book in which must be specified, in separate columns, under appropriate heads: 1. The *names* of persons assessed; 2. Land by township, etc.; 3. City and town lots; 4. Personal property, showing number, kind, etc.; 5. Cash value of real estate, etc.; 6. Of personal property; 7. Money; 8. 'The assessment of the franchise, roadbed,' etc., such as may have been made by the State Board and furnished to him; * * * 14. Total value of all property. It thus appears that while as to assessments made by the Assessor the kinds are to be separately stated, the assessment by the State Board of the 'franchise, roadbed,' etc., is entered in one column and as a single item.'

"Now, he could certainly put upon his assessment book only what was sent to him by the State Board. And Section 3664 of the Political Code says he shall send a statement of

the amount of road and the valuation in the county, and nothing more. He has got nothing to do with the road outside of this county.

"An objection was made, which struck me as being exceedingly fine drawn, by the learned counsel who argued the case for the defendant. That whereas, the Constitution required an assessment to be levied upon the roadbed, rails, and rolling stock of railroads, yet the statements furnished by the State Board of Equalization to the County Assessor simply showed the length of the main track of the road, and that therefore it was not such an assessment as the Constitution required. I say the objection was rather too finely drawn for my comprehension. I do not suppose it ever entered into the contemplation of the persons who framed or adopted the Constitution, or of those who framed the statute, that anything more should go into the estimation of the number of miles of road than the number of miles from one terminus to the other; that the side tracks, the double tracks, the turnouts should not enter into the computation of the number of miles of railroad, but that the length of the railroad should be computed as a distance from one terminus to the other. And it is very true that in the computation of the length of this road they have not made any calculation of these various double tracks, these various side tracks, these various turnouts to the roundhouses and to the turntables, but that they have computed the length of the road from one end to the other as a single track. Certainly the defendant is not injured by that computation. Certainly it was not injured by having a less number of miles assessed than would have been assessed had all these side tracks been taken into consideration in making the computation. They would have had reason to complain, and would have complained loudly, if any such assessment had been made. If they had estimated that in Sacramento there were four or five tracks, and that, therefore, the company had so many additional miles of road, the defendant then would have complained with reason. But now they have no right to complain.

"Mr. Justice Field—I forget whether there was anything in the record showing that they include the four miles of water.

"Mr. Terry—Yes, sir, that is included. They did measure the road from Fourth and Townsend Streets, I believe, or from some street in San Francisco, by way of Oakland to Sacramento, and thence to the eastern boundary of the State, and estimated it as a whole distance, the number of miles from that point; and four miles of that, according to the evidence, is water. But the length was given in by the railroad company as 604 miles. The State Board of Equalization adopted their measurement and called it 604 miles. I do not think they can be heard to complain. Or if they do complain that the four miles of water which was added

ought not to have been added, and if Mr. Bergin complains that the various side tracks and turnouts ought to have been added which were not added, we will call them four miles and square the thing.

"It is suggested to me that the statute in every case says 'main track' in saying what shall be assessed. The Constitution, however, does not use the words 'main track;' the objection was that the statute did not follow the Constitution. The statute says in every case that they should assess the main track.

"Now another objection has been made, and that is strongly insisted upon, that it is necessary, for the validity of a tax, that notice should be given, or that there should be some opportunity for the person against whom the tax is imposed, to be heard. The only authority that I have heard cited in support of that proposition is the assertion in Mr. Cooley on Taxation, which, as has been shown, is not supported by the citations of authority collated in the note to that citation.

"A question was asked by the Court as to whether the cases referred to by Mr. Cooley, being cases of local assessment or assessment for local improvement, whether there has been any distinction drawn in the books between assessments for general governmental purposes and assessments for local improvements. I think, if the Court please, that there is a very wide distinction, and that it is founded upon good and sufficient reason. Taxes for general governmental purposes are imposed arbitrarily upon the citizen and no returns made, or are expected to be made, to the person who pays this burden, his sufficient consideration for the payment of his share toward the support of the Government being the protection afforded to him by that Government in the enjoyment of life, liberty, and property. But assessments for local improvement are based upon a very different rule, and are governed by different principles. They go upon the theory that by the expenditure of this amount for this local improvement the value of the property will be enhanced, and that the party will be made a gainer by it. Now, we will take the case of two persons holding adjoining lands upon a street in a town or village. One of them desires to have a certain local improvement made and makes application to the proper authority for that, and he says: 'I want my neighbor to join in the improvement because he will be benefited the same as I am.' But in assessment for governmental purposes, the question is to be determined by the Tax Collector or by the Assessor. The only question to be determined by the Assesssor is, What is the value of that property? He is selected for that very purpose, and is supposed to be fitted for that position. He is selected for his supposed knowledge of the values of property in that county. That is the rule, at least. I don't know how far it goes in practice. But he is elected and is the agent of the electors for all purposes of

this kind; and he is elected because of his supposed familiarity with values in that county.

"But in local assessments another element enters. Will this expenditure add to the value of your property? In what degree will it add to the value of your property? Will the benefit which you will derive from this contemplated improvement be as great or greater than the money which we call upon you to expend?

"Now, those are matters which must be determined by the exercise of judgment based upon testimony. And it is very proper that when my neighbor calls upon the proper authorities to make a local improvement, and to assess a portion of the costs of that improvement against me, because my property is to be benefited, that I should have notice and an opportunity to show that my property would not be benefited; that it would be an injury to me rather than a benefit; that it would destroy the usefulness of my property; that it would place it in a valley, or place it on top of a hill, or pile the dirt in front of it, or take it away, so that I would have no foundation for my building to rest upon.

"I find that the distinction is drawn, and pretty markedly drawn, in Mr. Cooley's work on Taxation. He says, in regard to special assessments, on page 416: 'So the fact of special taxation standing apart from the general burdens imposed for State and municipal purposes is governed by principles which do not apply generally. The principle is, that the value of the property charged will be enhanced by the work.' And he cites 44 Pennsylvania St. 118, 121; 31 Pennsylvania State, and 41 New York, 123.

"And in the case of the *Lodi Water Co.* vs. *Costar*, 18 N. J. Equity Reports, 519, it was held that an assessment of land without reference to the benefit it would derive, was the taking of private property for public use. That is, the assessment must be in proportion to the expected benefits. Of course, when a person's property is to be taken upon that ground, a portion of it to be expended for improvement of the balance, he is entitled to his day in Court; he is entitled to appear before that tribunal and show that he would not be benefited, but, on the contrary, he would be injured, by the proposed expenditure, by the proposed improvement, or so called improvement.

"And then, further, Mr. Cooley says: 'Being a peculiar species of taxation, there must be special authority in the laws to impose the tax. The ordinary grant of power to a municipal corporation to levy taxes does not carry the power to make local assessments.' (Cooley on Taxation, page 418.) 'And when such a grant of power is made, it is always to be construed with great strictness.' Citing *Reed* vs. *Toledo*, 18 Ohio, 161, and *Allentown* vs. *Henry*, 73 Pennsylvania State, 404: 'And the authorities should levy the tax imposed strictly, and literally pursue that authority.' That has been held in various cases in California. In the case of *Smith* vs.

Davis, and *Taylor* vs. *Donnell*, and *Chambers* vs. *Satterlee*, 40 California, 497.

"Now, we say further, that if notice was necessary, the defendant had notice, and did appear, and was heard at length before the State Board of Equalization, both before and after the levy of the assessment. There is no doubt of the fact, that upon the petition of the defendant, after the assessment was made, the defendant was permitted to appear before the Board; that a day was appointed for the hearing; that he appears by his attorneys on that day, and that a hearing was had; and that a decision was arrived at after evidence taken and argument heard. (See Finding 34, page 80, of Transcript.)

"Mr. Justice Field—How many cases does that apply to?

"Mr. Terry—It applies to all the cases of 1881, and all of 1880, but not to the cases of 1882; 1880 was before the passage of that Act, but I think the law contemplated that there should be notice, because Section 3664, as it stood before that amendment, which they say did not pass by constitutional majority, provided, that if they refused to give their statement, then the tax should be final. At least, that is my reading of it. That is the fair construction of it. But, of course, the implication was that if they did give in their statement, then they would be entitled to be heard, and if they were overtaxed, they would have a right to come in and show cause.

"It was objected, on the part of counsel for the defendant in this case, that it would have been vain for these parties to apply to the State Board of Equalization, because the State Board had no power to afford any relief; having made the assessment, they were powerless to alter or change it. Now, I say that cannot be true of any tribunal in the world. Will any tribunal—be it a Court, or be it a Board—be deprived of the power of altering or amending a decision before it has become a finality, before it has passed out of their hands, while it is still in the breast of that Board or of that Court? Until it has passed out of their hands, they can change it or alter it as they please. Hence, the Assessors, in this case, were required to make the assessment on or before the first Monday in May, I think. They were required to send down the notice to the Assessors on the fifteenth of May. Now, at any time before the fifteenth of May they should have reconsidered any determination they had arrived at; they could have altered or amended that assessment in any respect that they desired.

"Mr. Brown—Your Honors will recollect that one application was made in 1880. The law adviser of the Board, the Attorney-General of the State, went before the Board and insisted that they had no power to correct the amount.

"Mr. Terry—The Attorney-General was wrong in his view of the law, in my opinion. The reason for their refusal was a matter of judgment. The record does not show what

was the reason. They did appear in 1880. But in 1881 there is no doubt about their appearance, and there is no doubt about the obligation on the part of the State Board of Equalization, that they had a right to appear; that they were rightly in Court, and that the Court or the Board had abundant authority to afford them any relief which they showed themselves entitled to. Section 3664 of the Political Code was spread upon the statute books of the State. I do not think that an executive officer should have any right when he finds a statute on the statute book of the State, to institute an inquiry whether it is properly there or not. He is bound to obey it. The Courts can go behind the statute book. The Courts can determine whether it was passed in accordance with the Constitution or not. But executive officers must obey it as long as it is on the statute book until the Courts have declared it invalid.

"Now, these executive officers, finding this statute on the statute book, guided themselves by it. The defendants in this case had not then discovered or had not thought they had discovered, that there was anything wrong about the passage of that. They looked upon it as being a part of the law of the land. And they availed themselves of the provisions of that Code, and they appeared before this Board of Equalization, and a day was appointed, and in strict pursuance of that law, within the five days they filed their application, and ten days thereafter was fixed as the day upon which they would be heard. And they were heard and allowed to give evidence, and made an extended argument, and a decision was made after the fullest and fairest hearing. Now, I say it does not make any difference whether that statute was passed by a constitutional majority or not. The Constitution itself in fairness would give to any man the right to be heard where his interests were threatened. And the Board, having the authority, would have the right to fix the rules under which they would give it. But in this case the rules were fixed by statute, and they followed those rules. The law required that, within five days after the assessment, application should be made, and not more than ten days after, a hearing should be had. And that was done in this case, and a full hearing was had.

"Mr. Justice Field—Is not there something in the very designation, 'Board of Equalization,' that implies that parties are to be heard?

"Mr. Terry—I think so.

"Mr. Justice Field—Just as in the case of the term 'Court,' without any law constituting a Court as a tribunal in which parties whose rights were threatened had a right to be heard, did not the very designation necessarily imply that they had a right to be heard? It seems to me that the idea of the term 'Board of Equalization' is the correction of any mistakes that might have occurred.

"Mr. Brown—The Board of Equalization acted in a dual

capacity. One of their duties was to assess railroad property, the property of all railroads operating in more than one county. The other was to equalize taxes between the different counties throughout the State. I have no doubt, and I never have had any doubt, that the Constitution went still further, and intended to give them the power to equalize individual assessments. But the matter went before the Supreme Court of the State, and they held, in the case of *Wells, Fargo & Co.*, that they had no power to equalize individual assessments.

"MR. JUSTICE FIELD—In regard to railroad property, it seems to me that if they estimated it too high they would have the power to lower it, as they would the assessment in counties.

"MR. BROWN—The view I take of it is this: that they had the single power to assess railroad property, and that the value affixed by them was necessarily final.

"MR. DELMAS—Here is a unit. How can you equalize it? There is nothing to equalize with.

"MR. TERRY—The duty of that Board was to ascertain the value. And the Constitution made it their duty to assess this property at its actual value, as all other property is required to be assessed. The first section of article thirteen defines what property shall be assessed, and says that it must be assessed at its value to be ascertained as provided by law. Now, it was the duty of that Board, as sworn officers under the Constitution, to fix a fair value upon this property, to estimate it at its actual value; and in order to arrive at that, to enable themselves to do that understandingly, they must get all the information in their power and from all the sources that could best supply that information. It was, therefore, intended by the Constitution that they should hear evidence, and that anybody who felt interested should be allowed to go before them and should be allowed to give information; that if I thought an assessment was too low I would have a right to go there and furnish evidence that this road was worth more than they assessed it at; and, if the railroad thought it was too high they would have the right to go before the Board and give such information as would enable them to arrive at a proper valuation of the property. Of course, that involved the taking of testimony and the making of an inquiry into the value of this property by all the sources of information in their power, in order to do this duty which they were required to perform under the obligation of their official oaths. And it does appear that a statement was made by the railroad company, that the railroad officials did appear, both before and after the assessment, both in 1880 and in 1881.

"MR. WIGGINTON—Do I understand that you claim that there was any power in this State Board of Equalization to change the valuation after the Board of Assessment had acted as a Board of Equalization?

"MR. TERRY—Why, certainly, up to the time that they had transmitted their statement to the County Boards.

"MR. WIGGINTON—Up to the time that they had transmitted it, they had acted as a Board of Assessment?

"MR. TERRY—Yes, sir.

"MR. WIGGINTON—Then, as a Board of Assessment, they might change the valuation?

"MR. TERRY—Yes, sir.

"MR. WIGGINTON—The question asked is this: After they had ceased to act as a Board of Assessment, could they begin to act as equalizers?

"MR. TERRY—They never ceased to act as Assessors. Their duty as Assessors does not end until they have forwarded their statement to the Assessors of the different counties. Suppose a motion for a new trial is made before a Judge. It does not make any difference what opinion he may have expressed in regard to the motion. He may write out an order denying it; but as long as he keeps that order in his possession, and does not transmit it to the Clerk for filing in Court, it is subject to his control, and is still in his own mind. It is subject to revision; and if any new light should satisfy him that the order was wrong, it would be perfectly competent for him to tear it up and write another one granting a motion for a new trial and file it. But up to the time of filing it is entirely in his breast. So I say, as to this Board of Assessment. Until they had transmitted to the County Assessors the statement of the amount of taxes fixed upon that road, it was all in their own mind. They could take testimony, and they could change or alter their decision as they pleased up to the time when it left their possession.

"MR. WIGGINTON—The question is, whether they had power over it after they had once transmitted it?

"MR. TERRY—No, sir; no, sir.

"MR. WIGGINTON—Then, as I understand you, Judge, they acted as Assessors and as equalizers both at the same time?

"MR. TERRY—Certainly; I don't care whether you call it equalization or what you call it; but there was nothing to equalize but that.

"MR. JUSTICE FIELD—What the Judge means is that they can hear testimony, so that in fixing the valuation of any particular item they can correct it. So that really they were acting as Assessors, with power to correct any erroneous finding they had made.

"MR. WIGGINTON—I don't understand what is meant precisely, by saying that there was no other property to equalize. My theory goes to the extent, whether they ever did, at any time, act under the Code as a Board of Equalizers at all. They certainly could not have equalized as between the different defendants as are here in Court.

"MR. TERRY—Well, it is a controversy about terms. It means the same thing. My proposition is, that it was in the power and in the right of this Board to change that assess-

ment at the very last moment if they discovered that they were wrong in the valuation.

"MR. WIGGINTON—After they had fixed the valuation, and prior to the time that they sent this statement to the County Assessor, where was there any opportunity given by law to appear before them?

"MR. TERRY—The statute provided that within five days after the assessment was made this notice should be given.

"MR. WIGGINTON—That is the law that is not constitutional.

"MR. TERRY—But they thought it was, and they acted upon it. But suppose it was no law, you have notice that this Board meets on the second Monday of April. You have notice given you by law that at that meeting, at some time during the course of that session, which commences on the second Monday of April, the assessment of the whole property will be made, and it is your business to be there and ascertain when it is made. Now, your statement must be handed in on or before the first Monday in April. Of course, there can be no assessment until your statement is handed in, or until the time when your statement ought to have been handed in, has elapsed, and you had refused to hand it in. Then they might go to work and make an arbitrary assessment. But they must wait; they must wait until your statement is handed in. They must wait until somewhere about the first Monday in April, then the next session they must do it. Then the first session that is held after the first Monday in April, is on the second Monday in April, and the assessment must be made on or before the first Monday in May; so that you have notice that at that session of the State Board of Equalization which commences on the second Monday of April, your property will be assessed; and if you have got anything to say to that Board, if you have got any information to give that Board, if you have got any argument to offer before them, or if you have any evidence, it is your duty to be at that session; just as you are informed that this Court will meet upon the second Monday in June or the second Monday in July, for the trial of causes, and if you have any cause on the calendar of this Court, you will notice that that cause will be reached and it is your business to be there on the first day of that term and have your case set down for trial. If you don't do it, your case may be taken up and decided in your absence and you are without remedy.

"Now, then, you have that notice that in the month of April, or, at least, between the second Monday in April and the first Monday in May, this assessment will be made. The only work that they have to do at that time is the assessment of railroads operating in more than one county. That is the whole of their business at that session. There are, I don't know how many, half a dozen or more, that are to be taken up at that time. It was the business of these parties to appear before that Board. These parties would have a right to ap-

pear before that Board and give testimony at that time. The Constitution provides the mode and the manner in which these men shall assess that property. Five men shall come together and shall assess this property at its value. Is it not contemplated that they should get information from all sources that are available? And would not the man whose property was going to be assessed at that very time know that fact? They have a great deal better notice of that than you have of the time when the County Assessor will assess your property. They will assess your property between the first Monday in March and the first Monday in July. But here is an assessment that is to be made between the second Monday in April and the second Monday in May, and they know where it is to be made. They know where the Board meets It is composed of five men, and they meet to hear testimony, and those interested have a right to be there and to offer testimony, and I have no doubt that you were there and did offer testimony. The proof is that in 1880 and 1881 you were there, both years.

"It is said that this action should be dismissed because it was brought in the name of The People of the State of California, when it should have been brought in the name of the county in which the property was situated. There are no repealing words in the Act of 1880. There is nothing in its title to inform us that it is intended to amend any provision of any Code. And the only ground upon which it can be claimed to act as a repeal of Section 3900 of the Political Code must be that the two are so absolutely and irreconcilably inconsistent that they can't stand together. If they can both stand, then there was no repeal, because there is no evidence of any intention upon the part of the Legislature, either in the Act itself or in the title of the Act, that indicates any such intention.

"Now, the title of an Act is usually not a matter of any very great importance in determining what was intended. But, under a peculiar provision of the Constitution of California, Article IV, Section 24, 'it is provided, every Act shall embrace but one subject, which subject shall be expressed in its title,' so that it becomes a little important in legislating in California to see that the title of an Act indicates the proper object of it. 'But if any subject shall be embraced in an Act which shall not be expressed in its title, such Act shall be void only as to so much thereof as shall not be expressed in its title.'

"If it had been intended to repeal a section of the Political Code or to amend a section of the Political Code, and the statute had, among other things, said that such a section of the Political Code shall be amended so as to read as follows, etc., it would have been void under this provision of the Constitution, because the title of the Act would give no indication of the intention to change, alter, or amend the Code. So much of the Act—any subject embraced in the Act which

was not indicated by its title—is void under the provision of the Constitution.

"Now, the rule laid down in the books, apart from that as to repeal by implication, is that a general statute without express words will not repeal the provision of a former one unless the two Acts are irreconcilably inconsistent.

"Sedgwick on Constitutional and Statutory Construction, 97.

"Henderson's Tobacco, 11 Wallace, 652: This was a case where the penalty of the Circuit Court has been imposed for using improper stamps. The question was whether some later legislation had not repealed the Act under which the penalty was imposed. The Court held that the two Acts were absolutely and irreconcilably inconsistent, and that the Act was repealed.

"In the case of *The People* vs. *the San Francisco and San José Railroad*, in 28 California 254, the same doctrine was held in an opinion written by Mr. Justice Sawyer.

"And in *The People* vs. *Gherke*, 37 California, 228: This case was very much stronger. In that case a tax had been laid for certain school and road purposes. Two or three years afterward an Act of the Legislature was passed, authorizing the levy of a tax of eighty cents on the hundred dollars, which should be the full extent of the taxes levied for county purposes. And the question in that case was whether that Act, if there was no repealing clause, repealed the Act authorizing the imposition of certain percentages for these local purposes. And the Court held that it did not.

"Now, the judgment in this case would be the same whether the suit was brought in the name of The People or in the name of the county. The gentleman who argued upon the other side, seemed to think that a different judgment is required, because, in that case, the form of the complaint given asks for two per cent damages, or two per cent per month interest, because the form of the complaint was more specific than the form given in Section 3900 of the Political Code. But in an action commenced under 3900 of the Political Code judgment would have to be given for two per cent per month, because Section 3803 expressly provides that all actions for the recovery of delinquent taxes shall bear interest at the rate of two per cent per month. Then there follow other sections to show that other cases might have been brought—3808, 3809, and 3810; that other actions might be brought for taxes other than those mentioned in Section 3900.

"Section 3808 provides: 'If any person removes from one county to another, after being assessed on personal property, the Collector of the county in which he was assessed may employ an attorney to sue for and collect the same in the Assessor's name.'

"Now, there was a lawful authorization for the Assessor, in his own name, to commence an action for the recovery of

taxes assessed against personal property when the party had moved out of the county in which the property was assessed. Why was it not the intention of the Legislature to repeal that portion of 3900? 3809 provides: 'On the trial a certified copy of the assessment, signed by the Auditor of the county where the same was made, with the affidavit of the Collector thereto attached, that the tax has not been paid, describing it as on the assessment book or delinquent list, is primary evidence that such tax and the per centum is due, and entitles him to judgment, unless the defendant proves that the tax was paid.' The only possible defense in cases of that kind is to prove that the tax had been paid.

"MR. WIGGINTON—It is not necessary to bring that case.

"MR. TERRY—Well, it was an action for the collection of taxes, under an Act authorizing it to be brought. I was proceeding to speak to the question whether Section 3900 of the Political Code had been repealed by the statute of 1880. And I had referred the Court to two cases in the 11 Wallace, the same volume which contains the case of the *United States* vs. *Tynen*, and the case of the Distilled Spirits, where two statutes upon the same subject were presented, and it was held that one did not repeal the other. In the latter case, page 364, Mr. Justice Bradley delivered the opinion of the Court:

"'The claimants insist, in the first place, that no recovery can be had under the information on the conceded facts of the case. The information contained three counts relied on: One in Section 45 of the Act of July 13, 1866, and two in Section 48 of the Act of June 30, 1864, as amended by the Act of July 13, 1866. The first-named section declares that 'all distilled spirits found elsewhere than in a bonded warehouse, not having been removed from such warehouse according to law, and the tax imposed by law not having been paid, shall be forfeited.' The first count charges that the spirits in question were thus found. It is insisted that they were removed according to law.

"'We do not think that a removal procured by a false and fraudulent bond, though accepted by the Collector, was a removal according to law, and we fail to perceive how the spirits which were thus withdrawn from the bonded warehouse can be exempted from the operation of this section.

"'The other section, on which the second and third counts were framed, declares that 'all goods, wares, merchandise, articles, or objects on which taxes are imposed by the provisions of law, which shall be found in the possession, or custody, or within the control of any person or persons in fraud of the internal revenue laws, or with design to avoid payment of said taxes, may be seized, etc., and shall be forfeited to the United States.' It is insisted that this section does not apply to distilled spirits, inasmuch as they are provided for in a different part of the Act by a distinct series of sections.

"'An examination of the Act of 1864 will show that the

first fifty-two sections are of a general character, intended to apply to all taxes imposed by the Act, and that the forty-eighth section is a specialty of that character, and applies to distilled spirits as well as all other articles. By the Act of 1866 this section was amended in a manner not material to the question at issue. When thus amended, it still stood as it did before, having the same office and the same general application. The addition in the Act of 1866 of several new sections relating to the removal of distilled spirits from a bonded warehouse, and imposing penalties and forfeitures for giving fraudulent bonds for that purpose, or for illegally removing the spirits, does not deprive the forty-eighth section of the Act of 1864 of its general application. There is nothing incongruous or repugnant between it and the new sections. Both can stand, and an information may be founded on both or either, whenever the facts will admit. It is a very common thing for cumulative remedies to be thus provided. The Act of 1868, which revises the entire revenue law relating to spirits and tobacco, furnishes a striking instance of this. After providing for a large number of specific forfeitures, or forfeitures for specific breaches of the law, it follows up the subject by sections of the most general nature, so framed as not to admit of any possible escape or evasion; and which necessarily include most of the cases before specifically provided for. Statutes *in pari materia*, like the Acts of 1864 and 1866, are to be construed together, and repeals by implication are not favored if the Acts can reasonably stand together.'

"The other case is the case of Henderson's Tobacco, 11 Wallace, 656: 'It is contended on behalf of the United States, that the proviso relied upon by the claimants was repealed by the Act of July 20, 1868.

"'If this is so, it was a repeal by implication only. That Act contains no words expressly repealing either the Act of 1867 or that of 1864, to which the one of 1867 was a supplement. On the contrary, the repealing clause which it does contain indicates plainly the intention of Congress to leave in force some portions of former Acts relative to the same subject-matter. The one hundred and fifth section enacts, 'that all Acts and parts of Acts inconsistent with the provisions of this Act are hereby repealed.' This is an express limitation of the extent to which it was intended former Acts should cease to be operative, namely, only so far as they are inconsistent with the new Act. It is quite inadmissible to engraft upon this express declaration of legislative intent an implication of more extensive repeal. Statutes are, indeed, sometimes held to be repealed by subsequent enactments, though the latter contain no repealing clauses. This is always the rule when the provisions of the latter Acts are repugnant to those of the former, so far as they are repugnant. The enactment of provisions inconsistent with those previously existing, manifests a clear intent to abolish the

old law. In the *United States* vs. *Tynen* it was said by Mr. Justice Field, that "when there are two Acts upon the same subject, the rule is to give effect to both, if possible. But if the two are repugnant in any of their provisions, the latter Act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first; and even where two Acts are not, in express terms, repugnant, yet, if the latter Act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first Act, it will operate as a repeal of that Act.' For this several authorities were cited, some of which have been cited on the present argument. This is, undoubtedly, a sound exposition of the law. But it must be observed that the doctrine asserts no more than that the former statute is impliedly repealed *so far* as the provisions of the subsequent statute are repugnant to it, or *so far* as the latter statute, making new provisions, is plainly intended as a substitute for it. Where the powers or directions under several Acts are such as may well subsist together, an implication of repeal cannot be allowed.'

"Now, the case of *The People* vs. *Gherke*, 37 Cal. 228, was a very strong case for the doctrine of implied repeal.

"This was an action to recover State and county taxes levied in Tehama County for the year 1867–8. The defendants had judgment in the Court below, from which, and from an order denying a new trial, The People appealed. The other facts are stated in the opinion of the Court. The first and controlling point presented on this appeal involves the power of the Board of Supervisors of Tehama County, in the matter of levying taxes upon the taxable property of the county for the fiscal year 1867–8. On the twenty-sixth of February, 1866, the Legislature passed a special Act, as follows:

"'SECTION 1. The Board of Supervisors of Tehama County are hereby authorized to levy, at the same time that other State and county taxes are levied, eighty cents upon each one hundred dollars' worth of taxable property of said county, which tax shall be assessed and collected as provided by law, and shall constitute the entire tax in said county for county purposes.

"'SEC. 2. This Act shall take effect immediately after its passage.'

"This Act was specially pleaded by defendants as restrictive of the power of the Board of Supervisors to levy any taxes on property within the county for county purposes exceeding in the aggregate eighty cents on the one hundred dollars, and the same was by defendants offered and read in evidence on the trial. At the date of and prior to the passage of the above Act, a general law of the State was in force authorizing the Board of Supervisors of each county in the State, except the City and County of San Francisco, 'to levy and collect annually a tax for *county expenditures*, not exceed-

ing sixty cents on each one hundred dollars' valuation; and upon the same property the Board of Supervisors of each county is also authorized and empowered to levy and collect annually such additional special taxes as the laws of this State may authorize them to levy and collect. There was then also in force a general law authorizing the Board of Supervisors of each county of the State to levy a tax of not exceeding thirty cents on each one hundred dollars of taxable property in their county.' Citing various statutes before that time authorizing levies of various sums for certain purposes, this Act was to the effect that eighty cents shall be the full amount of tax for county purposes. Now, the levy was made.

"As appears by the record, the Board of Supervisors of Tehama County, at their February term, 1867, caused an order to be duly entered of record levying a property tax for the fiscal year 1867-8, by which was levied upon each one hundred dollars of taxable property in their county the following items of tax: for State purposes, $1 13; County General Fund, 80 cents [that was the full amount provided by statute]; Interest Fund, 40 cents; Tehama County Wagon Road Fund, 25 cents; School Fund, 17 cents; Contingent Fund, 7 cents; Road Fund, 3 cents.

"There were ninety-two cents then levied on the one hundred dollars in excess of the eighty cents authorized by that statute, 'in the aggregate amounting to two dollars and eighty-five cents on each one hundred dollars of taxable property in the county.' The answer of defendants raises no issue upon the validity of the first item in the above levy of one dollar and thirteen cents for State purposes, but alleges the entire levy to be null and void in consequence of the other items of the levy exceeding in the aggregate eighty cents on each one hundred dollars of taxable property, as being in excess of the power conferred upon the Board of Supervisors by the special Act of February 26, 1866, hereinbefore recited. The question now presented for consideration is: Did this special Act of February, 1866, repeal, by necessary implication, all or either of the Acts above referred to, so far as the same conferred power upon the Board of Supervisors of Tehama County to lay taxes upon the taxable property of their county for general or special county purposes? The Act does not, in direct terms, repeal preëxisting statutes; and if a repeal of the statutes above referred to, or either of them, in whole or in part, is affected by its enactment, it is by implication only, and by reason of the repugnancy or irreconcilable inconsistency of the evident meaning of its positive terms with these prior laws. Repeals by implication are never favored; on the contrary, if prior and subsequent legislative enactments may well subsist together, Courts are bound to uphold the former, is a principle too well established to require comment.

"They find that the Act in question did not repeal the

former Act; that the tax was properly levied. They reversed the case and ordered judgment to be entered for plaintiffs.

"Upon that same point we have another proposition, and that is that this objection, if there were an objection to the manner in which this action was commenced, is one which should have been taken specially by demurrer or by answer. It is an objection to the capacity to sue. There is no doubt about the fact that the plaintiff is an interested party in this litigation. A portion of these taxes go into the treasury of the plaintiff if collected. The plaintiff, then, without any statutory provision, would be a necessary party to the suit. Now, whether the party could maintain this action for the whole amount, or in its own name, goes not to the sufficiency of the facts stated to maintain the action, but to the capacity of the plaintiff to sue.

"Upon that point, I read from 60 California, 404. This was an action commenced by the Swamp and Overflowed Land District Number 110, to recover an assessment for purposes of reclamation. A demurrer was interposed to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action; and a further demurrer that the plaintiff did not show that it possessed capacity to sue, because it has not alleged the proper organization.

"The first statement in the complaint is that 'the plaintiff, a corporation duly formed, organized, and created under and by virtue of the law of the State of California, for cause of action alleges.' This statement is followed by a statement of the cause of action. The defendants demurred to the complaint. The first ground of demurrer is that the complaint does not state facts sufficient to constitute a cause of action. The objections specified are, in substance, that it does not appear from the complaint that the plaintiff was ever duly created a swamp and overflowed land district. That objection, however, if well taken, would go to the legal capacity of the plaintiff to sue, and not to the sufficiency of the facts stated to constitute a cause of action.'

"Citing the *Phœnix Bank* vs. *Donnell*, 40 N. Y. 410:

"'A demurrer on the ground that the plaintiff has not the legal capacity to sue, would be bad, because it does not appear upon the face of the complaint that the plaintiff has not. It is not a good ground of demurrer that it does not appear in the complaint that the plaintiff has the legal capacity to sue. That omission can only be taken advantage of by answer.'

"I cite this because it is urged that the objection that plaintiff had not capacity to sue is waived by not taking advantage of it by demurrer or by answer.

"Mr. Judge Sawyer [after reading Section 2 of the Act of 1869]—At the last term of the Supreme Court of 1881 they held that the Act of 1875 repealed the second clause of the Act of 1869. That decision was confirmed again at the last session.

"MR. TERRY—There was a repealing clause. The proposition that we make here is that there was no inconsistency in the two Acts; that they are cumulative remedies. Of course, no Act could be commenced under the Act of 1880 until all the circumstances authorized by Section 3900 of the Code had occurred. There must have been a delinquency, an offer for sale, a withdrawal, and an order of the Controller to bring a suit in either event.

"Now, the Act of 1880 is not directly in conflict with Section 3900 of the Political Code. It is simply a cumulative remedy providing that the suit might be commenced in the name of the county or in the name of The People of the State. If it were held mandatory that suit should be commenced in the name of the county, it takes away the right of the State to collect her taxes; because, the Act of 1880 provides that the county may sue in her own name for State and county taxes, or for county taxes alone, without the State taxes. Now, suppose the county should elect simply to bring suit for the county taxes levied upon property. To construe that the Act of 1880 had repealed Section 3900 of the Political Code would leave the State without any remedy by action to collect her taxes.

"MR. JUDGE SAWYER—The State is unfortunate in not having a Legislature to look out for those things.

"MR. TERRY—Well, we looked out for it in the Constitution. We provided that no clause in an Act upon any subject not indicated in its title should be of any effect. Now, there is no indication of any intention to repeal or amend any portion of any Act of the Political Code, Civil, or Penal, or of the Code of Civil Procedure; and, therefore, if there had been an express repeal under that provision of the Constitution which gives effect only to such subjects as are mentioned in the title of the Act the Act would be void. And those provisions are not directory but are mandatory.

"MR. BROWN—We simply say there is power to sue for State taxes or for county taxes. A State tax may be legal and a county tax may be illegal. The legal tax may be paid so as to leave only the other tax unpaid about which there is to be any contest, making ample provision to sue and recover any tax that might be legal or illegal.

"MR. TERRY—Now, counsel who argued this case for defendants have made some admissions as to the right of the State to impose a burden on corporations. They have gone somewhat further, and have asserted the right of the State to make exemptions of property. Now, I cannot, for the life of me, see why an exemption of property from taxation is not such a discrimination as the imposition of larger taxes upon particular individuals or particular classes is. If a large proportion of the property of the State is exempted from taxation the rate of taxation is proportionately greater upon

those who are not exempt. And it appears if the imposition of taxes comes under the proposition as to the equal protection of the law, then the exemption of the property of any individual, either a church or school house, or anything else which does not belong to the State, or is not owned by a municipal corporation, would be an unjust and invidious discrimination against those who are taxed. But it must be admitted that such would not be the case. Therefore, I do not think that this question of taxation was intended to be guarded against by that provision of the Fourteenth Amendment giving to all the equal protection of the law.

"The proposition that we then make is, that in the first place, there was no denial of notice and an opportunity to be heard, to these parties when the assessment was levied.

"That they did have notice given them both, under the decision of the State Tax Cases, 92 United States Reports.

"That they had the fullest opportunity to be heard, and were heard; and that the question was decided after the full hearing.

"In the next place, we insist that, under the ruling laid down in the case of *Heath* vs. *Railroad Company*, in 6 Wallace, and the case in 17 Wallace, the *United States* vs. *Railroad Company*, there is no discrimination in the levy of taxes upon this railroad company; that though the taxes are, in name, assessed against the corporation, in fact, they are taxes against the holders of the bonds, who could be reached in no other manner; and that the taxes, when paid by the corporation, can be offset by them, deducted from the amount of principal or interest, which they are required to pay upon those bonds.

"We say that the taxes were properly levied; that the Board of Equalization pursued the law strictly in the assessment of this property; that that is the inevitable conclusion from the testimony in this case, inasmuch as the paper produced before us, *prima facie* establishes the proper levy of the taxes, and no effort has been made to controvert or rebut it.

"We say that this statement is all the statement made by the Board of Equalization to the different County Assessors, and that it was all that was required of them to do, by way of informing the different County Assessors of the kind of property within their reach; that it was exactly the statement which is required to be given by Section 3664 of the Political Code. It is exactly in accordance with that. It is a statement as to the number of miles within the county, and the tax is levied upon it.

"And we say that the assessment, which in Section 3650 is required to be recorded by the County Assessor upon the assessment roll of his county, means just the statement which the law requires the State Board to send to him; that it could mean no more and could mean no less."

Penalty, Interest, and Attorneys' Fees.

As incidents of the tax, the plaintiff claims that defendant is liable for a penalty of 5 per cent on the amount of the tax; also, for interest at the rate of 2 per cent per month from the date of delinquency, and for 10 per cent as counsel fees. All these incidentals, of course, depend on the validity of the tax. If the tax is not valid, the defendant is not liable for any of them; but if the tax is valid, I contend that the defendant is liable for all of them.

The liability for the penalty is fixed by the Political Code in very clear language.

Pol. Code, Sections 3746, 3770.

The law on this subject is so clear that no argument is necessary. Indeed, I understand it is not disputed by the defendant.

INTEREST.

The question of interest depends upon the construction of Section 3803 of the Political Code, which is as follows: "Interest at the rate of two per cent per month must be collected on such delinquent taxes from the time they were first delinquent until paid." I contend that the words "such delinquent taxes," refer to all taxes that become delinquent, the word "such" being used in the sense of "said," and having reference to the subject of delinquent taxes in general, which were the matters under consideration in that part of the Code. The object of the Legislature in imposing interest was, obviously, to compensate the State and counties for the delay in paying taxes. It is customary in other States to impose interest, and although the rate here fixed is high, it was necessary to make it so in order to operate as an inducement to the taxpayer to pay promptly. If the rate were low, the delinquent might permit the tax to remain unpaid, because in California money usually commands a high rate of interest.

On this subject we cite:

Cooley on Taxation, 309–315.

The only decisions of the Supreme Court of California on the subject are the following:

Harper vs. *Rowe, 53 Cal. 236.*

Lake County vs. *Sulphur Bank Q. M. Co., 4 West Coast Rep. 191.*

Lake County vs. *Sulphur Bank Q. M. Co., 8 West Coast Rep. 151.*

In the first case the Court says: "If the tax remains finally delinquent after the Tax Collector has exhausted all means for its collection, it may possibly be subsequently collected in some other method provided by law; in which event the interest is to be added, to compensate for the long delay and as an inducement to the taxpayer to make a voluntary payment, and thus stop the interest."

In the other cases the Court held that the interest is not collectible where suit is brought prior to the third Monday in March of the year next after the tax becomes delinquent. In this case the suit was brought after that time. Hence we contend those cases do not apply.

ATTORNEYS' FEES.

The defendant is liable to plaintiff for ten per cent counsel or attorneys' fees.

Political Code, Sec. 3900.

In this section it is provided as follows:

"If in such action [to recover the tax] the plaintiff recover judgment, there shall be included in such judgment an attorney's fee of 10 per cent on the amount of the tax."

We think this so plain as to require no argument. There are no decisions on the subject.

In view of the foregoing statutory provisions, I contend we are entitled to recover the penalty, interest, and attorneys' fees.

The judgment against the plaintiff in error should be reversed.

Respectfully submitted.

E. C. MARSHALL,
Attorney-General of the State of California,
Attorney for Plaintiff in Error.

The judgment against the plaintiff in error should be reversed.

Respectfully submitted.

E. C. MARSHALL,
Attorney-General of the State of California,
Attorney for Plaintiff in Error.

118-394-417

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In the Supreme Court

OF THE

UNITED STATES.

No. 619.

County of San Bernardino,

Plaintiff in Error,

vs.

The Southern Pacific Railroad Co.,

Defendant in Error.

Brief for Defendant,

BY

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Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 619.

COUNTY OF SAN BERNARDINO, PLAINTIFF IN ERROR,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY,
DEFENDANT IN ERROR.

BRIEF ON BEHALF OF DEFENDANT.

THE CASE STATED.

The defendant is a railroad corporation, and owns and operates a steam railroad, which, with its branches, passes into and through several counties of the State of California, of which the plaintiff is one. The number of miles of road owned and operated by defendant during the fiscal year ending on the thirtieth of June, 1881, was seven hundred and eleven and fifty-six hundredths ($711\frac{56}{100}$). This road was assessed by the State Board of Equalization for State and county taxes for the fiscal year ending on the thirtieth of June, 1881. The property assessed consisted of the franchises, roadway, road-bed, rails, and rolling-stock of the defendant. The assessment also included, as part of the roadway, the *fences* between the roadway and the lands of

the adjoining proprietors, which may or may not be the property of adjoining land owners, according to circumstances, which do not appear in this case, but which, in either case, as claimed by defendant, are not within the jurisdiction of the State Board of Equalization. This was done by the State Board of Equalization, in the language of the bill of exceptions or findings, as you may please to call them (Record, p. 78, subd. XXVIII), "knowingly and designedly." These fences were valued at three hundred dollars per mile, but the number of miles are not stated. This assessment was apportioned to the several counties in which the property is situated in proportion to the number of miles of road in each. To collect the taxes so apportioned to the plaintiff the tax collector of that county—once only—offered the property situated in that county for sale, pursuant to instructions given by the Controller of State, as provided in section 3899 of the Political Code hereinafter set forth. (Record, p. 71, subd. XX.) There were no *bona fide* purchasers, and the tax collector reported his action to the Controller, who thereupon directed an action to be brought against the defendant to recover the taxes. Accordingly this action was brought. The action was contested by the defendant upon several grounds, which will be stated further on. The case was tried by the court without a jury (a jury having been waived by the parties to the action), and judgment ordered to be entered in favor of the defendant (Record, p. 57, f. 65), findings having been waived. Thereupon the defendant, notwithstanding the taxes had thus been adjudged illegal, being minded to pay a reasonable portion thereof, offered to allow judgment for a certain amount to be entered in favor of the plaintiff. This offer was accepted by the plaintiff,

and thereupon a stipulation was made and filed in the action, which will be found at page 57 of the record. The stipulation embraced several other actions as well as this. The stipulation was to the effect that plaintiff should take judgment for the sum of $\$8,462\frac{48}{100}$ (Record, page 62, f. 79, No. 2,757), in full payment of the taxes, and that the claim of the plaintiff for penalty for non-payment (amounting to five per cent.), percentage for attorney's fees (amounting to ten per cent.), and interest at the rate of two per cent. per month from date of delinquency until judgment obtained, might be further litigated without prejudice on account of the action of the plaintiff in accepting judgment as in said stipulation provided. (Record, p. 80, ff. 102–3–4.) Upon this stipulation the court set aside the order for judgment in favor of the defendant, previously entered, and entered a judgment in favor of the plaintiff according to the terms of the stipulation. Thereupon the plaintiff prepared a bill of exceptions containing all the facts established by the testimony, which was agreed to by the defendant and allowed by the court. (Record, p. 64, f. 85.) Upon the facts stated in this bill of exceptions the case is submitted to this court.

In relation to the collection of delinquent taxes, the Political Code of California, since 1873, has contained, and still contains, the following provisions:

SEC. 3899. The Controller may, at any time after a delinquent list has been delivered to a collector, direct such collector not to proceed in the collection of any tax on said list amounting to three hundred dollars further than to offer for sale but once any property upon which such tax is a lien. Upon such direction the collector, after offering the property for sale once, and there being no purchaser in good faith, must make out and deliver to the controller a certified copy of the entries upon the delinquent list relative to such

tax; and the tax collector, or the controller, in case the tax collector refuses or neglects for fifteen days after being directed to bring suit for collection by the controller, may proceed, by civil action in the proper court, and in the name of the people of the State of California, to collect such tax and costs.

SEC. 3900. In such action a complaint in the following form is sufficient:

[Title of Court.]

THE PEOPLE OF THE STATE OF CALIFORNIA

vs.

[NAMING THE DEFENDANT.]

Plaintiff avers that the defendant is indebted to plaintiff in the sum of $——, State and county taxes, for the fiscal year 18—, with five per cent. added for the non-payment of such taxes, and —— dollars, costs of collection to date. Plaintiff demands judgment for said several sums, and prays that an attachment may issue in form as prescribed in section five hundred and forty of the Code of Civil Proceedure.

[Signed by the tax collector or controller, or his attorney.]

On the filing of such complaint the clerk must issue the writ of attachment prayed for, and such proceedings shall be had thereunder as under writs of attachment issued in civil actions. If in such action the plaintiff recover judgment, there shall be included in such judgment an attorney's fee of ten per cent. on the amount of the tax. In such action the certified copy mentioned in the preceding section, made by the collector and delivered to the controller, is *prima facie* evidence that the person against whose property the tax was levied is indebted to the people of the State of California in the amount of such tax. In case of payment of any such taxes after suit as above mentioned shall have been commenced, or after the recovery of judgment therefor, such payment must be made to the county treasurer of the county in which such taxes are due. Whereupon the treasurer, after distributing to the several funds of the county the portions belonging to it, and paying to the controller or his attorney the portion received as attorney's fees, and other

costs, must pay the remainder to the State treasurer at the times and in the manner prescribed by law for the payment of other State taxes."

In 1880 the Legislature, without amending the foregoing provisions of the Code, passed the following act, relating in part to the same subject:

An act prescribing the form of complaint in actions to recover delinquent taxes, and to authorize the bringing of suits therefor.

SECTION 1. In any action that may be hereafter commenced in any county, or city and county, in this State, for the collection of delinquent taxes for any fiscal year, the complaint may be in the following form, and shall be legally sufficient, and on the trial thereof the duplicate assessment-roll for any said fiscal year of said county, or city and county, or a copy of any entry therein duly certified, showing unpaid taxes against the defendant, or, in cases where the defendant is sued in a representative capacity, against any person or estate he represents, shall be *prima facie* evidence of the plaintiff's right to recover.

[Title of court.] [Name of plaintiff] *vs.* [name of defendant.] Plaintiff avers that defendant is indebted to plaintiff in the sum of $ —— [naming the amount for county, or city and county] taxes, with five per cent. penalty added thereto for the non-payment thereof, and interest thereon at the rate of two per cent. per month from the [date], and fifty cents costs of advertising. Plaintiff further avers that defendant is indebted to plaintiff in the further sum of $—— [naming amount] for State taxes, with five per cent. penalty added thereto for the non-payment thereof, and interest thereon at the rate of two per cent. per month from [date] and fifty cents costs of advertising, which said taxes were duly assessed and levied upon [the real or personal] property of said defendant, to wit, [describe property as assessed], for the fiscal year [naming the year]. Wherefore plaintiff prays judgment against said defendant for said several sums, with interest and penalty as aforesaid, and costs of suit.

[Signature of attorney].

And in any case where the defendant is sued in a representative capacity, such other further or additional allega-

tions as may be necessary to charge him in such capacity; and it is further provided that any county, or city and county, where such taxes are delinquent may sue in its own name for the recovery of delinquent taxes, whether the same be for county or city and county, and state purposes or taxes, or either of them.

SEC. 2. This act shall take effect and be in force from and after its passage.

Under this last act this action was brought. The form of complaint prescribed proceeds upon the theory that the law of the State in relation to interest on delinquent taxes *exacts* interest on *all* delinquent taxes from the date of the delinquency until judgment obtained. We contend that such is not the case, as will appear hereafter. In this last act no mention is made of attorney's fees, and in the foregoing provisions of the Political Code no mention is made of interest.

The provisions of the Political Code authorizing the collection of interest on delinquent taxes are as follows:

SEC. 3800. At the time mentioned in section thirty-seven hundred and ninety-seven, the collector must make an affidavit, indorsed on the list, that the taxes not marked "paid" have not been paid, and that *he has not been able to discover any property belonging to or in possession of the persons liable to pay the same whereof to collect them.*

SEC. 3803. Interest at the rate of two per cent. per month must be collected on *such* delinquent taxes from the time they were first delinquent until paid.

The action was contested mainly upon the general ground that the constitution and laws of California in relation to taxation are more onerous, oppressive, and burdensome in their application to railroad and other quasi public corporations than they are to other private corporations and natural persons, and also that such *quasi* public corporations, if they operate their property in more than one county, are

denied, by such laws, the right to be heard as to the assessment of their property, which right is accorded by such laws to all other tax-payers, and, therefore, that such laws are repugnant to the fourteenth amendment to the Federal Constitution, which declares that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. These discriminations will be specifically stated further on. The action was also contested upon the following grounds:

1st. That the assessment sued on was never in fact made, or, at least, that no legal evidence of the fact was produced at the trial.

2nd. That a large amount of property [fences] was illegally included in the valuation of the defendant's roadway.

3rd. That the franchise of the defendant, assessed at $1,423,000, is a Federal franchise, and therefore not subject to State taxation.

The facts found in the bill of exceptions, so far as they are material to this argument, may be briefly stated as follows:

The defendant was incorporated in 1865 under a general law of California in relation to railroad corporations, and is the same corporation which is mentioned in an act of Congress of the 27th of July, 1866, in relation to the Atlantic and Pacific Railroad Company [14 U. S. Stat., 292], and also in an act of Congress of the 3rd of March, 1871, in relation to the Texas and Pacific Railroad Company [16 U. S. Stat.,

573]. These acts, so far as they bear upon the decision of this case, will be quoted further on. By these acts the defendant, as we contend, was selected by the Government of the United States as its agent to take part in the construction, maintenance, and operation of two trans-continental railroads, intended for the use of the Government in the administration of postal, military, and other governmental affairs. By these acts the defendant was authorized to construct a railroad from San Francisco to the Colorado river, at or near the Needles, there to connect with the Atlantic and Pacific railroad and form a continuous line from San Francisco to Springfield, in the State of Missouri, and also a branch line from Tehacapa Pass [a point on said main line] to the Colorado river at Fort Yuma, there to connect with the Texas and Pacific railroad and form a continuous line from San Francisco to Marshall, in the State of Texas. These roads were not the road for the construction of which the defendant was incorporated, but the State of California, by an act of the Legislature, assented, if her assent was necessary, to the change required by these acts of Congress and agreed to the other terms contained in said acts. This act of the Legislature of California will be found further on. It was under these franchises granted by Congress that the roads in question were constructed, and have since been operated by the defendant, and it is these franchises which the State of California has attempted to tax in this case.

To aid the defendant in the construction of these roads, the United States granted to the defendant about eleven million acres of land lying in equal parts on each side of their roads. In order to obtain the necessary funds to build these roads the defendant put a mortgage on the roads and

lands amounting to $30,000,000 and upwards, and borrowed money thereon to that amount. This mortgage was a valid and subsisting lien upon these roads and lands at the time the assessment in question was made. These lands have always been assessed by the local assessors at their actual value, no deduction from such value on account of the mortgage being made; and the taxes so levied thereon have always been paid in full, notwithstanding, as claimed by the defendant, such valuation was illegal, because no deduction on account of the mortgage was made. Similar lands, when owned by natural persons or by corporations not *quasi* public, when covered by a mortgage, have always been assessed by the local assessors at their actual value less the debt secured by the mortgage. Although fully cognizant of the existence of the mortgage on the roads of the defendant, the State Board of Equalization assessed them at their full value, and made no deduction from such value on account of said mortgage.

In the State of California there are, and for many years have been, corporations formed under the laws of that State for all the purposes for which corporations are usually organized. Under the laws of that State corporations may be formed for the purpose of carrying on any business in which natural persons may lawfully engage. In that State it has been the practice and custom to grant railroad franchises to natural persons, and at least one railroad in that State affected by a public use has been for several years and still is owned and operated by a natural person.

At the session of the Legislature of 1881 a bill was introduced in the assembly of said Legislature, of which the following is a true copy, and such proceedings were thereupon

had in said Legislature as are hereinafter set forth. Said bill was an amendment to section 3664, of the Political Code of the State of California, which section, prior to said amendment, read as follows, to wit:

"SECTION 3664. On or before the first Monday in May in each year the State Board of Equalization shall assess the franchise, roadway, road-bed, rails, and rolling-stock of railroads operated in more than one county. The president, secretary, cashier, or managing agent, or such other officer as the State Board of Equalization may designate, of any corporation operating any railway in more than one county in this State shall furnish said board, on or before the first Monday of April in each year, a statement, signed and sworn to by one of the officers, showing in detail for the year ending on the first Monday in March in such year—

"(*a.*) The whole number of miles of railway owned, operated, or leased in the State by such corporation making the return, and the value thereof per mile, with a detailed state- of all property of every kind located in the State.

"(*b.*) Also, a detailed statement of the number and value thereof of engines, passenger, mail, express, baggage, rolling-stock in use on the corporation's line in the State during the year for which the return is made. The return shall show the amount of rolling-stock, the annual gross earnings of the entire railway, and the proportionate annual gross earnings of the same in this State, as nearly as practicable, and all the property designated hereafter in this section, and such other facts as the State Board of Equalization may in writing require.

"If such officer or officers, so designated, shall fail to make and furnish such statement, said Board of Equalization shall fix the value and proceed to assess the property of the corporation so failing; the valuation fixed by them shall be be final and conclusive.

"The said property shall be assessed at its actual value.

"Assessments shall be made upon the entire railway within the State, and shall include the right of way, road-bed, track, bridges, culverts, and rolling-stock. The depots, station grounds, shops, buildings, and gravel-beds shall be assessed by the assessor of the county where situated as other property. On or before the fifteenth day of May in each year said

board shall transmit to the county assessor of each county through which any railway, operated in more than one county, may run, a statement showing the length of the main track or tracks of such railway within the county, together with a description of the whole of said tracks within the county, including the right of way by metes and bounds, or other description sufficient for identification, and the assessed value per mile of the same, as fixed by a *pro rata* distribution per mile of the assessed value of the whole franchise, roadway, road-bed, rails, and rolling-stock of such railway within this State.

"Said statement shall be entered on the assessment-roll of the county. At the first meeting of the board of supervisors, after such statement is received by the county assessor, they shall make and cause to be entered in the proper record book an order stating and declaring the length of the main track, and the assessed value of such railway lying in each city, town, township, school district, or lesser taxing district in their county through which such railway runs, as fixed by the State Board of Equalization, which shall constitute the taxable value of said property for taxable purposes in such city, town, township, school, road, or other district; and the clerk of the board of supervisors shall transmit a copy of each order or equalization to the city counsel or trustees, or other legislative body of incorporated cities or towns, the trustees of each school district, and the authorized authorities of other taxation districts through which such railway runs. The taxes on said property, for State and county purposes, after collection by the county collector, shall be paid over to the county treasurer as other taxes. All such railway property shall be taxable upon said assessment at the same rate, by the same officers, and for the same purposes as the property of individuals within such counties, cities, towns, townships, school districts, and lesser taxation districts."

Said proposed amendment is in the following words:

["respectively. Any person dissatisfied with an assessment made by said Board of Equalization against his or its property may, within five days after such assessment is made and entered of record on the books of said board, by written petition, apply to said board to have the same corrected in any partic-

ular. Said petition must state the grounds of objection to such assessment, and must be filed with the clerk of the board. The board must fix a time for hearing said petition, which must not be less than five nor more than ten days from the time the same is filed, and must, upon such hearing, receive such proofs as may be offered by the petitioner, or by the attorney general, or any other person appearing against such petition, and such other proofs as, in the judgment of the board, bear upon the question at issue. By an order of the board, or upon the demand of the petitioner, the proofs shall be reduced to writing by a phonographic reporter. If the board do not order the proofs to be reduced to writing by such reporter, but the same is done upon the demand of the petitioner, the petitioner must pay the expenses thereof. After hearing such proofs the board shall, within ten days, determine, in writing, upon the matters involved in the petition and proofs, and may alter, in conformity with such determination, the assessment complained of. Any person feeling aggrieved at such determination who shall pay the tax upon the assessment complained of, may, within ten days after such payment, bring an action in the superior court in the county in which the tax, or any part thereof, has been paid, against the Board of Equalization, and in the complaint may allege any fact averred in his petition filed with said board, showing the illegality of such tax in whole or in part, or that the property, in whole or in part, was assessed for more than its actual value.

"A copy of the complaint must, within thirty days after it has been filed, be served upon the chairman or clerk of said board, and said board shall have thirty days in which to answer or demur to the same. At the time the board answers or demurs it may demand that the suit be tried in the superior court of Sacramento county.

"The provisions of the Code of Civil Procedure relating to pleadings, proofs, trials, and appeals, shall be applicable to the proceedings herein provided for, and the testimony taken before the Board of Equalization may be read in evidence; and in such proceeding the court shall have power to determine the matters involved in the issue, and, in making such determination, may ascertain whether the property was taxed or assessed in proportion to its value, and if the determination is in favor of the petitioner, as to the illegality of the tax, in whole or in part, in excess of its actual value,

it shall, by its judgment, direct the return of the tax paid, or of such part thereof as may have been illegally exacted, or exacted in excess of the actual value of the property.

"Upon presentation of a certified copy of such final judgment to the controller, he shall draw his warrant upon the State treasurer for the amount of such judgment, and the treasurer shall pay the same out of any funds in the State treasury not otherwise appropriated. At the next settlement made thereafter by the controller with the county treasurer of any county that received any portion of said illegal tax he shall require the treasurer thereof to pay such portion into the State treasury to reimburse the State for the advance made on said judgment. The Board of Equalization may direct the district attorney of any or every county interested, and the attorney general to defend for such board any proceedings commenced under the provisions of this section."]

The said amendatory bill was entitled "An act to amend an act to establish a political code, approved March 12, 1872, by adding thereto two new sections, to be known as sections 3664 and 3665, relating to the assessments of the railroads and other property by the State Board of Equalization and county assessors for the purposes of taxation." Said bill, in the due course of business, was passed by the Assembly, and contained all the matter which is found in said section 3664, as first above quoted.

Having passed the Assembly, the bill was transmitted to the Senate. The Senate amended section 3664 by adding thereto the latter portion of the matter hereinbefore quoted. Upon the return of the bill to the Assembly the following proceedings were had, as appears on the Journal of that body:

The consideration of Senate amendment to Assembly bill No. 475, "An act to amend an act entitled an act to establish a political code," approved March 12, 1872 by adding

thereto two new sections to be known as sections 3664 and 3665, relating to assessments of railroads and other property by the State Board of Equalization and county assessors for the purpose of taxation, resumed.

The previous question was demanded by Messrs. Edwards, Jackson, and Paulk.

The ayes and noes were demanded by Messrs. Paulk, Whipple, and Del Valle.

The roll was called and the House refused to order the main question by the following vote:

Ayes—Messrs. Arick, Brown, Burns, Cameron, Crank, Daggett, Edwards, Gay, Geary, Gilmore, Hartshorn, Hoitt, Holden, Jackson, Jones, Kellogg, Kilburn, Lane, May, McCallion, McClure, McDonald, Mein, Mudgett, Noonan, Patterson of San Joaquin, Reddick, Reynolds, Streeter, Swift, Wasson of Ventura, Wasson of Mono, Young, and Mr. Speaker—34.

Noes—Messrs. Baker of Sacramento, Baker of Yolo, Birney, Bost, Branch, Chandler, Colman, Crumpton, Cunningham, Del Valle, Felton, Fraser, Freer, Garrity, Gavigan, Griffith, Hale, Hendrick, Henshaw, Howard, Keating, Leach, Leake, Lewis, Long, Matthews of Tehama, Matthews of San Benito, McMurray, Murphy, O'Connor, Patterson of Nevada, Paulk, Pinder, Platt, Samuels, Sargent, Siebe, Van Fleet, Wentz, Wertsbaugher, Whipple, and Wood—42.

After the transaction of other business, the printed Journal proceeds:

The consideration of Senate amendment to Assembly bill 475 resumed.

The question recurred on concurring therewith.

The ayes and noes were demanded by Messrs. Paulk, Sargent, and Wentz.

The roll was called, and the Speaker declared the House had concurred in the Senate amendments:

Ayes—Messrs. Arick, Baker of Sacramento, Birney, Bost, Brown, Burns, Crank, Daggett, Edwards, Estee, Felton, Garrity, Gavigan, Geary, Gilmore, Hartshorn, Hoitt, Holden, Howard, Jackson, Keating, Kellogg, Laine, Mason, May, McCallion, McClure, McDonald, Mein, Noonan, O'Connor, Patterson of San Joaquin, Pinder, Reddy, Streeter, Swift, Van Fleet, Warkins, Wasson of Mono, Young, and Mr. Speaker—39.

Noes—Messrs. Alviso, Baker of Yolo, Branch, Chandler, Colman, Cunningham, Del Valle, Fraser, Gay, Griffith, Hale, Hendricks, Henshaw, Jones, Leake, Leach, Lewis, Long, Matthews of San Benito, McMurray, Murphy, Patterson of Nevada, Paulk, Platt, Reynolds, Samuels, Sargent, Siebe, Wasson of Ventura, Wentz, Wertsbaugher, Whipple, and Wood—32.

The following is a copy, on the same point and vote, of the original written Journal of the Assembly, deposited in the office of the Secretary of State, showing the last action of the House on Senate bill No. 475:

California Legislative Assembly, Twenty-fourth Session.

ASSEMBLY CHAMBER, FRIDAY, *March*, 4, 1881.

Consideration of Senate amendments to Assembly bill No. 475 resumed.

The question recurred on concurring therewith.

The ayes and noes were demanded by Messrs. Paulk, Sargent, and Wentz. Roll called. The House concurred in Senate amendments by the following vote:

Ayes—Arick, Baker of Sacramento, Birney, Bost, Brown, Burns, Crank, Daggett, Estee, Edwards, Felton, Garrity, Gavigan, Geary, Gilmore, Hartson, Hoitt, Holden, Howard Keating, Kellogg, Lane, Mason, May, McCallion, McClure, McDonald, Mein, Noonan, O'Connor, Patterson of San Joaquin, Pindy, Reddy, Streeter, Swift, Van Fleet, Warkins, Wasson of Mono, Young, and Mr. Speaker—39.

Noes—Alviso, Baker of Yolo, Branch, Chandler, Coleman, Cunningham, Del Valle, Fraser, Gay, Griffith, Hale, Hendrick, Henshaw, Jones, Leach, Leake, Lewis, Long, Matthews of St. Benito, McMurray, Murphy, Patterson of Nevada, Paulk, Platt, Reynolds, Samuels, Sargent, Siebe, Wentz, Wasson of Ventura, Wertsbaugher, Whipple, and Wood—32.

Matthews, of Tehema, and Kilburn paired, Kilburn voting aye and Matthews no. Messrs. Cameron and Crumpton paired; Cameron, aye, and Crumpton, no.

The following facts also appear from the Journal:

Other business having intervened, "the consideration of

Senate amendments to Assembly bill No. 475 resumed, the Speaker declaring that this was not the final action on the bill, and that the House had concurred in Senate amendments to Assembly bill No. 475, by a vote of 39 ayes to 32 noes. Mr. Paulk appealed from the decision of the chair on the ground that forty-one votes were required for concurrence. The question recurred, Shall the decision of the chair stand as the judgment of the House?"

After other business, on motion, the appeal was laid on the table by a vote of 38 ayes to 23 nays.

Mr. Hale then entered his protest against the decision of the Speaker, on the ground that forty-one members voting in the affirmative are necessary to adopt the amendments, the vote on concurring in the amendments being the only action of the House thereon. Thereupon, again: "The Speaker stated that the action on the Senate amendments to the bill was not the final action on the bill, and consequently a concurrence or non-concurrence in the amendments required a majority vote only."

Mr. Griffith and Mr. Kellogg then each entered his protest against the decision of the Speaker, declaring the Senate amendments concurred in, on the ground that a concurrence required a majority of the whole House.

No other vote was had or other announcement by the Speaker made in regard to this bill. No other action was had by the House, except that on March 4, being the last act before adjournment *sine die*, the bill was reported as correctly enrolled, and as having been presented to the Governor for approval. No action was taken on this report, and the bill does not appear to have been reported to the House as having been approved. (Record, p. 72, sub. XXIV.)

The constitution and laws of California not already quoted in relation to taxation, so far as needful to the decision of the points involved in this case, are as follows:

CONSTITUTION.

ARTICLE XIII.

SECTION 1. All property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word "property," as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership: *Provided*, That growing crops, property used exclusively for public schools, and such as may belong to the United States, this State, or to any county or municipal corporation within this State, shall be exempt from taxation. The Legislature may provide, except in the case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to *bona fide* residents of this State.

SEC. 4. A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property affected thereby. *Except as to railroad and other quasi public corporations*, in case of debts so secured, the value of the property affected by such mortgage, deed of trust, contract, or obligation, less the value of such security, shall be assessed and taxed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof in the county, city, or district in which the property affected thereby is situated. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property affected thereby shall become a part of the debt so secured; if the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment a full discharge thereof: *Provided*, That if any such security or indebtedness shall be paid by any such debtor or debtors, after assessment and before the tax levy, the amount of such levy may likewise be retained by such debtor or debtors, and shall be computed according to the tax levy of the preceding year.

SEC. 8. The Legislature shall by law require each tax-payer in this State to make and deliver to the county assessor,

annually, a statement, under oath, setting forth specifically all the real and personal property owned by such tax-payer, or in his possession, or under his control, at twelve o'clock meridian, on the first Monday of March.

SEC. 9. A State Board of Equalization, consisting of one member from each congressional district in this State, shall be elected by the qualified electors of their respective districts at the general election to be held in the year one thousand eight hundred and seventy-nine, whose term of office after those first elected shall be four years, whose duty it shall be to equalize the valuation of the taxable property of the several counties in the State for the purposes of taxation. The controller of State shall be *ex officio* a member of the board. The boards of supervisors of the several counties of the State shall constitute boards of equalization for their respective counties, whose duty it shall be to equalize the valuation of the taxable property in the county for the purpose of taxation: *Provided*, Such State and county boards of equalization are hereby authorized and empowered, under such rules of notice as the county boards may prescribe as to the county assessments, and under such rules of notice as the State board may prescribe, as to the action of the State board, to increase or lower the entire assessment-roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said assessment-roll, and make the assessment conform to the true value in money of the property contained in said roll.

SEC. 10. All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated, in the manner prescribed by law. The franchise, roadway, road-bed, rails, and rolling-stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization at their actual value, and the same shall be apportioned to the counties, cities and counties, cities, towns, townships, and districts in which such railroads are located, in proportion to the number of miles of railway laid in such counties, cities and counties, cities, towns, townships, and districts.

SEC. 13. The Legislature shall pass all laws necessary to carry out the provisions of this article.

ARTICLE IV.

SEC. 5. The Senate shall consist of forty members, and the Assembly of eighty members, to be elected by districts, numbered as hereinafter provided. * * *

SEC. 10. Each house shall keep a journal of its proceedings, and publish the same; and the yeas and nays of the members of either house on any question shall, at the desire of any three members present, be entered on the journal.

SEC. 15. No law shall be passed except by bill. * * * Any bill may originate in either house, but may be amended or rejected by the other; and on the final passage of all bills they shall be read at length, and the vote shall be by yeas and nays upon each bill separately, and shall be entered on the journal; *and no bill shall become a law* without the concurrence of a majority of the members elected to each house.

SEC. 24. Every act shall embrace but one subject, which subject shall be expressed in its title. But if any subject shall be embraced in an act which shall not be expressed in its title, such act shall be void only as to so much thereof as shall not be expressed in its title. No law shall be revised or amended by reference to its title; but in such case the act revised or section amended shall be re-enacted and published at length as revised or amended. * * *

ARTICLE XII.

SEC. 1. Corporations may be formed under general laws, but shall not be created by special act. All laws now in force in this State concerning corporations, and all laws that may be hereafter passed pursuant to this section, may be altered from time to time, or repealed.

ARTICLE XXII.

That no inconvenience may arise from the alterations and amendments in the constitution of this State, and to carry the same into complete effect, it is hereby ordained and declared—

SEC. 1. That all laws in force at the adoption of this constitution, not inconsistent therewith, shall remain in full force and effect until altered or repealed by the Legislature; and all rights, actions, prosecutions, claims, and contracts of the State, counties, individuals, or bodies corporate, not inconsistent therewith, shall continue to be as valid as if this con-

stitution had not been adopted. The provisions of all laws which are inconsistent with this constitution shall cease upon the adoption thereof, except that all laws which are inconsistent with such provisions of this constitution as require legislation to enforce them shall remain in full force until the first day of July, eighteen hundred and eighty, unless sooner altered or repealed by the Legislature.

JUDICIAL CONSTRUCTION.

Some of these provisions have been construed by the supreme court of California. Their construction is to be taken as a part of the constitution, and respected as such. That court has held as follows:

1st. Under section 9, art. XIII, the State board of equalization has no power to equalize individual assessments on county rolls. (*Wells, Fargo & Co.* vs. *The State Board of Equalization*, 56 *Cal.*, 194.)

2d. Under section 10 of Art. XIII, county boards have no power to raise or lower railroad assessments made by the State board; and that section 10 is self-executing; and that the State board has no power to equalize railroad assessments made by them.

People vs. *Supervisors*, 59 *Cal.*, 321.

S. F. and N. P. R. R. Co. vs. *The State Board of Equalization*, 60 *Cal.*, 12.

3rd. Under sections 9 and 10, Art. XIII, in the assessment of railroads no deduction can be made on account of mortgages. The court virtually admitted that this was a discrimination repugnant to the fourteenth amendment of the Federal Constitution, but sustained the discrimination on the ground that corporations are not persons within the meaning of that amendment.

C. P. R. R. Co. vs. *State Board of Equalizatian*, 60 *Cal.*, 35.

STATUTORY PROVISIONS.

Section 3650 of the Political Code prescribes the duties of county assessors in the preparation of their assessment books. Subdivision 15 of that section reads, in part, as follows:

SECTION 3650. * * * * *

Subdivision 15. When any property, *except that owned by a railroad or other quasi-public corporation*, is subject to or affected by a mortgage, deed of trust, contract, or other obligation by which a debt is secured, he must enter, in the proper column, the value of such security and deduct the same. * * *

SEC. 3652. On or before the first Monday in July, in each year, the assessor must complete his assessment book.

* * * * * * *

SEC. 3654. As soon as completed the assessment book, together with the map-book and statements, must be delivered to the clerk of the board of supervisors, who must immediately give notice thereof and of the time the board will meet to equalize assessments by publication in a newspaper, if any is printed in the county; if none, then in such manner as the board may direct; and in the meantime the assessment book must remain in his office for the inspection of all persons interested.

SEC. 3672. The board of supervisors of each county must meet on the first Monday of July in each year to examine the assessment-book and equalize the assessment of property in the county. It must continue in session for that purpose from time to time until the business of equalization is disposed of, but not later than the fourth Monday in July.

SEC. 3673. The board has power, after giving notice in such manner as it may, by rule, prescribe, to increase or lower the entire assessment-roll, or any assessment contained therein, so as to equalize the assessment of the property contained in said roll, and make the assessment conform to the true value of such property in money.

SEC. 3674. No reduction must be made in the valuation of property, unless the party affected thereby, or his agent, makes and files with the board a written application therefor, verified by his oath, showing the facts upon which it is claimed such reduction should be made.

SEC. 3675. Before the board grants the application, or makes any reduction applied for, it must first examine, on oath, the person or agent making the application, touching the value of the property of such person. No reduction must be made unless such person, or the agent making the application, attends and answers all questions pertinent to the inquiry.

SEC. 3676. Upon the hearing of the application the board may subpœna such witnesses, hear and take such evidence in relation to the subject pending, as in its discretion it may deem proper.

SEC. 3677. During the session of the board the assessor and any deputy whose testimony is needed must be present, and may make any statement or introduce and examine witnesses on questions before the board.

SEC. 3681. During the session of the board it may direct the assessor to assess any taxable property that has escaped assessment, or to add to the amount, number, or quantity of property when a false or incomplete list has been rendered, and to make and enter new assessments (at the same time cancelling previous entries) when any assessment made by him is deemed by the board so incomplete as to render doubtful the collection of the tax; but the clerk must notify all persons interested, by letter deposited in the post office or express, post-paid, and addressed to the person interested, at least ten days before action taken, of the day fixed when the matter will be investigated.

SEC. 3716. Every tax has the effect of a judgment against the person, and every lien created by this title has the force and effect of an execution duly levied against all property of the delinquent. The judgment is not satisfied nor the lien removed until the taxes are paid or the property sold for the payment thereof.

SEC. 3717. Every tax due upon personal property is a lien upon the real property of the owner thereof from and after 12 o'clock m. of the first Monday in March in each year.

SEC. 3718. Every tax due upon real property is a lien against the property assessed, and every tax due upon improvements upon real estate assessed to others than the owner of the real estate is a lien upon the land and improvements, which several liens attach as of the first Monday of March in each year.

SEC. 3759. The tax collector must, at the time specified in

the preceding section, deliver to the auditor a complete "delinquent list" of all persons and property then owing taxes.

As to Railroad Assessments.

In addition to section 3664, already quoted, the Political Code further provides upon this subject as follows:

Sec. 3692. The powers and duties of the State board of equalization are as follows:

1. * * * * * * *
2. * * * * * * *
3. * * * * * * *

4. To hold regular meetings at the State capitol on the second Monday in each month, and such special meetings as the chairman may direct.

5. To annually assess the franchise, roadway, road-bed, rails, and rolling-stock of all railroads operated in more than one county in this State, at their actual value, on the first Monday in March, at twelve o'clock m., and to apportion such assessment to the counties and cities and counties in which such railroads are located, in proportion to the number of miles of railway laid in such counties, and cities and counties, in the manner provided for in section 3664 of said Code.

* * * * * * *

As to the Franchise of Defendant.

The eighteenth section of the act of Congress in relation to the Atlantic and Pacific Railroad Company (14 U. S. Statutes at Large, page 292) provides as follows:

Section 18. *And be it further enacted*, That the Southern Pacific railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific railroad, formed under this act, at such point near the boundary line of the State of California as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject

to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulations as to time and manner with the Atlantic and Pacific railroad herein provided for.

The 23d section of the act of Congress in relation to the Texas Pacific Railroad Company (16 U. S. Statutes at Large, page 573) provides as follows:

SEC. 23. That, for the purpose of connecting the Texas Pacific railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehacapa Pass, by way of Los Angeles, to the Texas Pacific railroad, at or near the Colorado river, with the same rights, grants, and privileges and subject to the same limitations, restrictions, and conditions as were granted to said Southern Pacific Railroad Company of California by the act of July twenty-seven, eighteen hundred and sixty-six: *Provided, however*, That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other company.

These acts of Congress were assented to, ratified, and confirmed by the State of California, and the defendant was authorized to amend its articles of incorporation and change the line of its road so far as necessary to enable it to comply with the requirements of Congress. The State also assented to any further or future legislation by Congress in relation to said defendant. All this was done by an act of the Legislature, approved April 4, 1870, entitled "An act to aid in giving effect to an act of Congress relating to the Southern Pacific Railroad Company" (Statutes of California, 1869–'70, page 883), which act is as follows:

SEC. 1. Whereas by the provisions of a certain act of Congress of the United States of America entitled "An act granting lands to aid in the construction of a railroad and

telegraph line from San Francisco to the eastern line of the State of California," approved July 27, 1866, certain grants were made to, and certain rights, privileges, powers, and authority were vested in and conferred upon the Southern Pacific Railroad Company, a corporation duly organized and existing under the laws of the State of California: therefore, to enable the said company to more fully and completely comply with and perform the requirements, provisions, and conditions of the said act of Congress, and all other acts of Congress now in force, or which may hereafter be enacted, the State of California hereby consents to said act, and the said company, its successors and assigns, are hereby authorized to change the line of its railroad so as to reach the eastern boundary line of the State of California by such route as the company shall determine to be the most practicable, and to file new and amendatory articles of association, and the right, power, and privilege is hereby granted to, conferred upon, and vested in them to construct, maintain, and operate by steam or other power the said railroad and telegraph line mentioned in said acts of Congress, hereby confirming to, and vesting in, the said company, its successors and assigns, all the rights, privileges, franchises, power, and authority conferred upon, granted to, or vested in said company by the said acts of Congress, and any act of Congress which may be hereafter enacted.

SEC. 2. This act shall take effect and be in force from and after its passage.

CONTENTIONS ON THE PART OF DEFENDANT.

The defendant contends as follows:

First. That the assessment in question was not made by the State Board of Equalization; that is to say, no legal evidence was introduced upon that point, and the bill of exceptions does not state as a fact that the assessment was made by that Board, and that if made by the Board, it is fatally defective in the matter of description.

Second. That the fences between the roadway and the adjoining lands are not a part of the roadway; and, if they were the property of defendant, which does not appear, they were illegally included in the valuation of the roadway, the State Board having no jurisdiction to assess them; and that, in view of this fact, no penalty, fees, or interest can be recovered in this action.

Third. That the taxes in question do not bear interest from the date of delinquency until judgment obtained, and therefore no interest can be recovered in this action.

Fourth. That the franchise of the defendant is a Federal franchise, and therefore not subject to State taxation.

Fifth. That corporations are persons within the meaning of the fourteenth amendment to the Federal Constitution.

Sixth. That the pretended act of the Legislature amending section 3664 of the Political Code, not having been passed by a majority of all the members elected to the Assembly, is not law and cannot be considered in deciding any point involved in this case.

Seventh. That the constitution and laws of California, in the assessment of property, discriminate against *quasi* public corporations in many ways, and thereby subject them to more onerous taxation than is imposed upon other tax-payers, and that therefore they violate that clause of the fourteenth amendment which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws.

Eighth. That neither the constitution nor the laws of California relating to the assessment of railroads operated in more than one county provide for notice to the owners thereof, or afford them an opportunity to be heard at any stage of the proceedings, either by personal citation or public notice or legislative enactment, and therefore they violate that clause of the fourteenth amendment which declares that no State shall deprive any person of life, liberty, or property without due process of law.

Ninth. That the constitution of California in relation to the taxation of the property of *quasi* public corporations was not adopted in the exercise of the power to alter or repeal general laws under which corporations are formed reserved to the State; but, if it be held otherwise, then that the State cannot, under the pretense of exercising such reserved power, deprive such corporations, in respect to their property, of the protection afforded by the guaranties of the Federal Constitution.

ARGUMENT.

I.

The Assessment in Question was not made by the State Board of Equalization, or, if it was, no Legal Evidence of the Fact was Introduced at the Trial,

It is hardly necessary to say that the assessment is the foundation of the tax levy and must be proved, or the taxes cannot be recovered. (*Cooley on Taxation, pp.* 259 *and* 260.)

The thirty-third finding (*Record, page* 80), is in these words:

"There was no testimony or facts in the case other than as appears in these findings to countervail the effect or legal operation of any of the documents stated in these findings.'

The only testimony introduced upon this point was a leaf from the original assessment book of San Bernardino county. (*Record, page* 70.) Neither the record book of the transactions of the State Board of Equalization nor certified copies thereof were introduced. (*Record, page* 67, *Subds.* XV, XVI.) Their record, or certified copies, are the only legal evidence of the transactions of the board, unless the record has been lost or destroyed, which is not pretended in this case.

The evidence offered is in the form of a letter bearing date May 13th, 1880, addressed to the assessor of San Bernardino county, signed by the members of the board and countersigned by their clerk. It does not purport to be an assessment; on the contrary, it informs the assessor that, thirteen days before the date of the letter, the board had made an assessment. If the assessment, as stated, had been made thirteen days before, it is certain that the letter was not the

assessment. It was merely the statement which the law required the board to transmit to the assessor. The law required the board to make the assessment on or before the first Monday in May, and to transmit a statement to the assessor on or before the fifteenth of May, showing, etc. (*Section* 3664 *of Political Code, ante p.* 10.) So the assessment and statement must be separate and distinct acts evidenced by separate and distinct documents or records. The latter may describe the contents of the former correctly or not; but, whether it does or not, it cannot be received as legal evidence of such contents. To prove them, the original or a certified copy must be produced, or something else made legal evidence by law. Nowhere in the Code is it provided that this letter or statement shall be received as evidence of the assessment.

The only evidence other than the original assessment, or a certified copy thereof, authorized by the Code, is a certified copy of the entries upon the delinquent list relative to the tax in question, which the tax collector is required to furnish the controller in case no purchaser appears at the tax sale. This certified copy is declared *prima facie* evidence that the taxes are due. (*Sections* 3899, 3900, *ante, pp.* 3 *and* 4.) The entries here referred to are not entries in assessment books which were offered in evidence by the plaintiff in this case. The assessment book and delinquent list are separate and distinct books or records. The former is made by the assessor and the latter by the tax collector. (*Sections* 3652, 3759, *ante, pp.* 21 *and* 22.)

It is true that section 3789 of the Code provides as follows:

"SEC. 3789. The assessment book, duplicate assessment

book, or delinquent list, or a copy thereof certified by the county auditor, showing unpaid taxes against any person or property, is *prima facie* evidence of the assessment, the property assessed, the delinquency, the amount of taxes due and unpaid, and that all the forms of law in relation to the assessment and levy of such taxes have been complied with." (*Approved March* 24, 1874.)

This was law long before the present constitution was adopted, and long before the State Board of Equalization was created. The assessment book there mentioned is the book made by the county assessor, and not the book made by the State Board of Equalization.

Again: But concede, for the sake of the argument, that an assessment was made, proved, and found, we claim that it fails to comply with the law in the matter of the description of the right of way, or roadway, as it is called in the constitution, or the railway itself. For the purposes of this point, I assume that the statement transmitted to the assessor by the State board is the assessment.

The roadway in question varies in width from thirty to two hundred feet. (*Record, page* 79, *Subd.* XXXI.) The law requires the State board to transmit to the county assessor "a statement showing the length of the main track or tracks of such railway within the county, together with a description of the whole of said tracks within the county, including the right of way by *metes* and *bounds*, or other description sufficient for identification. (*Political Code*, sec. 3664; *ante p.* 10.) In this assessment or statement there is no attempt to comply with this law. In view of the fact that the roadway varies in width, there should have been some description of it by metes and bounds, but there is none. There is no description whatever; not even the points at which the

road enters and leaves the county are given, or the towns through which it passes. The description is insufficient to identify the property. Where such is the case the assessment is void for uncertainty. To a point so well settled no authorities need be cited.

II.

The Fences were Illegally Included in the Valuation of the Roadway, and that, too, whether they be the Property of the Defendant or the Owners of the Adjoining Lands.

The record fails to show whether these fences belong to the defendant or the owners of the adjoining lands. It also fails to show how many miles of fencing there are. All it shows is that fences were included in the valuation of the roadway at $300 per mile.

Under the railroad law of California, the fences belong to, and must be maintained by, the owners of the adjoining lands, if the cost of fencing was included in the damages awarded to them for the right of way; otherwise they belong to, and must be maintained by the railroad company. Upon this subject the Civil Code of California provides as follows:

"SECTION 485. Railroad corporations must make and maintain a good and sufficient fence on either or both sides of their track and property. In case they do not make and maintain such fence, if their engine or cars shall kill or maim any cattle or other domestic animals upon their line of road which passes through or along the property of the owner thereof, they must pay to the owner of such cattle or other domestic animals a fair market price for the same, unless it occurred through the neglect or fault of the owner of the animal so killed or maimed. Railroad corporations paying to the owner of the land through or along which

their road is located an agreed price for making and maintaining such fence, or paying the cost of such fence, with the award of damages allowed for the right of way for such railroad, are relieved and exonerated from all claims for damages arising out of the killing or maiming any animals of persons who thus fail to construct and maintain such fence; and the owners of such animals are responsible for any damages or loss which may accrue to such corporation from such animals being upon their railroad track, resulting from the non-construction of such fence, unless it is shown that such loss or damage occurred through the negligence or fault of the corporation, its officers, agents, or employees."

1st. In order to recover upon this assessment, so far as the fences are concerned, it was incumbent upon the plaintiff to prove and have the fact found that they were the property of the defendant.

2nd. But if the defendant is to be presumed for any cause to be the owner of these fences, still their inclusion in the assessment was illegal, for they constitute no part of the property which the State Board of Equalization is authorized to assess Section 10 of Article XIII of the Constitution (*ante, page* 18) provides that: "All property, except as hereinafter in this section provided, shall be assessed in the county, city, city and county, town, township, or district in which it is situated in the manner prescribed by law. The *franchise, roadway, road-bed, rails,* and *rolling-stock* of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization." (*See also section* 3664 *of Political Code, ante, page* 10.)

By the roadway is meant the right of way, of which the fences on each side, if there be any, constitute no part. Telegraph poles and wires are erected upon the right of way, yet

it will not be pretended that they are to be assessed by the State board, either as separate from or a part of the right of way. All improvements, such as stations, depots, coal-bunkers, water-tanks, shops, fences, and telegraph lines, &c., whether on the right of way or off it, are to be assessed by local assessors. Such is the law, and such the practice and understanding of its ministers. At the foot of the assessment in question is found an assessment made by the county assessor, which is in keeping with this view of the law. (*Record, page* 70.) There we find the following assessment made by the county assessor:

"$48\frac{88}{100}$ miles of telegraph line in the county.
"Reservation and improvements thereon at Colton.
"Reservation and improvements thereon at all other points.
"Material, furniture, fuel, and all personal property."

Fences are improvements, and are included, if there be any, in the use of that word. The Constitution requires land and improvements thereon to be separately assessed. Section 2, Art. XIII, provides as follows:

"SEC. 2. Land and the improvements thereon shall be separately assessed. Cultivated and uncultivated land, of the same quality and similarly situated, shall be assessed at the same value."

Thus it appears that these fences in San Bernardino county were assessed, and lawfully assessed, by the county assessor, and that the inclusion by the State Board of their value in the value of the roadway, under the pretense that they constitute a part of the roadway, was not only in excess of the jurisdiction of that board, but was also, in all other respects, illegal.

A question on all fours with this has been decided by the Supreme Court of California. The controversy arose between the Assessor of the City and County of San Francisco and the State Board of Equalization as to the assessment of certain steamers known as the *Thoroughfare* and the *Transit*, the State Board of Equalization claiming jurisdiction to assess them, and also did the Assessor of the City and County of San Francisco. The Central Pacific Railroad terminates at Oakland Point, on the Bay of San Francisco, opposite the city of San Francisco. Communication between the city and the terminus of the railroad is made by these steamers. Upon the decks of these vessels are laid railroad tracks, and cars are run upon them when loaded and are transported across the bay either way, as the case may be.

It was claimed, on the part of the Board of Equalization, that these steamers were a part of the road-bed of the railroad within the meaning of the constitution and laws defining the jurisdiction of that board. The City and County of San Francisco assessed the steamers and sued the Central Pacific Railroad Company upon the assessment. In the court below the city and county recovered judgment, and the defendant, the Central Pacific Railroad Company, took the case to the supreme court, where the judgment was affirmed. The court said:

"Are they (the steamers), then, embraced within the words roadway or road-bed in the ordinary and popular acceptation of such words as applied to railroads? These two words, as applied to common roads, ordinarily mean the same thing, but as applied to railroads their meaning is not the same. The *road-bed* referred to in section 10, in our judgment, is the bed or foundation on which the superstructure of the railroad rests. Such is the definition given by both Worcester and Webster, and we think it correct. The *road-*

way has a more extended signification as applied to railroads. In addition to the part denominated road-bed, the roadway includes whatever space of ground the company is allowed by law in which to construct its road-bed and lay its track. Such space is defined in subdivision 4 of the 17th section and the 20th section of the act 'to provide for the incorporation of railroad companies,' etc., approved May 20, 1861. (Stats., 1861, p. 607; *S. F. & N. P. R. R. Co.* vs. *State Board*, 60 *Cal.*, 12.)"

San Francisco vs. *C. P. R. R. Co.*, 63 *Cal.*, 469.

The argument in support of the proposition that these steamers constitute part of the roadway or road-bed is certainly much more persuasive than the argument that the fences constitute part of the roadway.

The Result.

The value of these fences having been illegally included in the assessment, the entire assessment, according to familiar and well-settled principles in the law of taxation, is void, unless the case discloses facts by which the amount of the illegal part can be ascertained and separated from that which is legal. That cannot be done in this case. The record shows that the fences were valued at $300 per mile (*Record*, *p.* 78, *Subd.* XXVIII), but the number of miles is not stated. In the absence of this factor, the value of the fences cannot be ascertained.

Again; the taxes *per se* have been paid, and only the penalty for non-payment prior to the date of delinquency, attorneys' fees, and interest are now sought to be recovered in this action. Statutes imposing penalties (and these three items are all in the nature of penalties) are to be strictly construed and are not to be enforced, except in a clear case of a willful failure to comply with the law. No man is bound to pay an

illegal tax, or a tax which is illegal in part, if the illegal and legal cannot be separated. Could they have been separated in this case doubtless it would have been the duty of the defendant to tender payment of the legal part. Had the illegal and legal been separable, and payment of the latter been tendered and refused and action brought, no one will pretend that these penalties could have been recovered in such action. The result must be the same where, through the action of the officers of the law without any fault on the part of the tax-payer, a compliance with the law on his part, however willing, has been rendered impossible. He has a legal right to refuse to pay and to contest an illegal tax, and he cannot, because he elects to stand upon this legal right, be subjected to penalties which were not intended for persons standing in his relation to the law.

III.

The Taxes in Question do not Draw Interest from the Date of Delinquency until Judgment Obtained. Interest, therefore, cannot be Recovered in this Action.

As already stated, the laws of California authorize actions to be brought to recover taxes, either in the name of the county where the property is situated or in the name of the people of the State of California, and prescribe a form of complaint in each case (*ante, pp.* 4 *and* 5). These forms differ in substance. Where a county sues, the complaint mentions interest as recoverable, but does not mention attorneys' fees. Where the State sues the complaint mentions attorneys' fees as recoverable, but makes no mention of interest. These are mere forms, and they do not create the cause of

action. It was intended that each should be adapted to the enforcement of a cause of action elsewhere provided for, but through legislative mistake or oversight neither is fully adapted to that end. It certainly was not intended that interest should be recoverable if a county sues, but should not be recoverable if the State sues; or that attorneys' fees may be recovered if a State sues, but shall not be recovered if a county sues. For the purpose, therefore, of ascertaining in what cases interest may be recovered we must put aside these mere defective forms of pleading and look elsewhere.

The question turns upon the interpretation of sections 3800 and 3803 of the Political Code, which read as follows:

"SEC. 3800. At the time mentioned in section thirty-seven hundred and ninety-seven," (which is the third Monday in March,) "the collector must make an affidavit, indorsed on the list (delinquent list), "that the taxes not marked 'paid' have not been paid, *and that he has not been able to discover any property belonging to or in possession of the persons liable to pay the same whereof to collect them.*"

"SEC. 3803. Interest at the rate of two per cent. per month must be collected on *such* delinquent taxes from the time they were first delinquent until paid."

Section 3803 does not declare that interest must be collected on *all delinquent taxes* or on *delinquent taxes*, but that it must be collected on *such* delinquent taxes. To what does "such" refer? Certainly not to *all* delinquent taxes, but such as the collector states in his affidavit he has been unable to collect, *because he has been unable to discover any property whereof to collect them.* No such affidavit was made in this case, nor could such an affidavit have been made, for there were forty-eight miles of railroad, with all its stations, telegraph lines, water-tanks, and other equipments situated in the county and under the eye of the tax collector.

This case falls under the provisions of sections 3899 and 3900, where the controller is given the power to stop sale by the tax collector, after he has once offered the property for sale, and direct an action to be brought (*ante., pp.* 3 *and* 4). In such action no provision is made for the recovery of interest for the obvious reason that in such case the action in which an attachment may be issued is substituted for a forced sale by the tax collector; and as in the case of such sale the taxes do not draw interest from the date of the delinquency until collected by sale, so, by parity of reason, where an action by direction of the controller is made to take the place of a sale, no interest should be allowed to be recovered in such action (*Record, page* 71, *Subd.* XX). Any other rule would make the liability of the tax-payer to pay interest depend not upon the settled policy of the law, but upon the whim or caprice of the controller.

That delinquent taxes do not draw interest from date of delinquency until collected by the tax collector by a sale of the property has been decided by the supreme court of the State. (*Harper* vs. *Rowe*, 53 *Cal.*, 233.) In that case the court said:

> "Section 3803 has no application to a sale made by a tax collector to collect a delinquent tax in the first instance. If the tax remains finally delinquent, after the tax collector has exhausted all means for its collection, it may be possibly subsequently collected in some other method provided by law, in which event the interest is to be added to compensate for the long delay, and as an incentive to the tax-payer to make a voluntary payment and thus stop the interest."

Where the tax collector is directed to stop the sale and bring an action, and where there is plenty of property to satisfy any judgment that may be obtained in such action,

he cannot be said to have "exhausted all means for the coltion of the tax" until a judgment in such action has been obtained and a sale under it has been had, or the property has been offered for sale, and not even then, for under the laws of California, if there be no other purchasers, the State itself may become the purchaser.

Section 3773 of the Political Code provides as follows:

"But in case there is no purchaser in good faith for the same, as provided in this chapter, on the first day the property is offered for sale, then when the property is offered thereafter for sale, and there is no purchaser in good faith of the same, the whole amount of the property assessed shall be struck off to the people of the State as the purchaser and the duplicate certificate delivered to the county treasurer and filed by him in his office."

There are two other decisions by the supreme court of California in which this question has been considered and virtually decided in favor of the construction of defendant. The first was the case of *Lake County* vs. *Sulphur Bank Q. M. Co.* (4 West Coast Reporter, p. 186). At page 191 the court employs the following language:

"The judgment allows two per cent. per month upon the amount of taxes allowed from December 28, 1880. This is error. Manifestly section 3803 of the Political Code refers to the 'delinquent taxes' mentioned in the sections immediately preceding, and which remain unpaid until the third Monday of March; section 3,797. In the case at bar the action was commenced on the second day of March."

In a still later case between the same parties, decided on the 19th of November, 1885, the court in respect to the same question said: "That section 3803 of the Poiitical Code refers to delinquent taxes mentioned in the section immediately preceding, and which remain unpaid until the

third Monday of March. In so far, therefore, as the judgment appealed from allows two per cent. per month interest it is erroneous." *

These cases being by the highest court of the State, and containing a construction of a local statute, will of course be followed by this Court.

A certified copy of the opinion in this latter case has been filed with the clerk of this Court.

IV.

The Franchise of the Defendant is a Federal Franchise, and therefore not Subject to State Taxation.

That Congress has the power to create or select corporations as agents, or instrumentalities, or means of carrying into effect other powers, which are sovereign—whenever such corporations may be regarded by Congress as appropriate means to such an end—has never been seriously doubted since the great cases of *McCulloch* vs. *The State of Maryland* (4 Wheaton, 316), and *Osborn* vs. *U. S. Bank* (9 Wheaton, 738). The first question submitted in those cases was whether Congress had the power to incorporate "the subscribers to the Bank of the United States." Having first shown that the Government of the United States, "though limited in its powers, is supreme, and its laws, when made in pursuance of the Constitution, form the supreme law of the land (anything in the constitution or laws of any State to the contrary notwithstanding)," Chief Justice Marshall continued as follows:

"Among the enumerated powers we do not find that of establishing a bank or creating a corporation. But there is no phase in the instrument which, like the articles of

* The conditions in the case at bar are identical with those in the two cases cited. As in those cases, this action was commenced before the third Monday in March, that is to say, on the 8th of March. (See *Record*, p. 2.) Under the rule, therefore, announced in the cases cited, no interest can be recovered in this action.

confederation, excludes incidental or implied powers, and which requires that everything granted shall be expressly and minutely described. Even the Tenth amendment, which was framed for the purpose of quieting the excessive jealousies which had been excited, omits the word 'expressly,' and declares only that the powers 'not delegated to the United States, nor prohibited to the States, are reserved to the States or to the people,' thus leaving the question whether the particular power which may become the subject of contest has been delegated to the one government, or prohibited to the other, to depend on a fair construction of the whole instrument. The men who drew and adopted this amendment had experienced the embarrassment resulting from the insertion of this word in the articles of confederation, and probably omitted it to avoid those embarrassments' * * * Although among the enumerate powers of gov. ernment we do not find the word 'bank' or 'incorporation,' we find the great powers to levy and collect taxes, to borrow money, to regulate commerce, to declare and conduct war, and to raise and support armies and navies. The sword and the purse, all the external relations, and no inconsiderable portion of the industry of the nation are intrusted to its government. It can never be pretended that these vast powers draw after them others of inferior importance merely because they are inferior. Such an idea can never be advanced. But it may with great reason be contended that a government intrusted with such ample powers, on the due execution of which the happiness and prosperity of the nation so vitally depends, must also be intrusted with ample means for their execution. The power being given, it is the interest of the nation to facilitate its execution. * * * Throughout this vast republic, from the St. Croix to the Gulf of Mexico, from the Atlantic to the Pacific, revenue is to be collected and expended, armies are to be marched and supported. The exigencies of the nation may require that the treasure raised in the North should be transferred to the South, *that* raised in the East conveyed to the West, or that this order should be reversed. Is that construction of the Constitution to be preferred which would render these operations difficult, hazardous, and expensive? * * * The Government, which has a right to do an act, and has imposed on it the duty of performing that act, must, according to the dictates of reason, be allowed to select the means;

and those who contend that it may not select any appropriate means, that one particular mode of affecting the object is excepted, take upon themselves the burden of establishing that exception. * * * The power of creating a corporation, though appertaining to sovereignty, is not—like the power of making war, or levying taxes, or of regulating commerce—a great substantive and independent power, which cannot be implied as incidental to other powers, or used as a means of executing them. It is never the end for which other powers are exercised, but a means by which other objects are accomplished. No contributions are made to charity for the sake of an incorporation, but a corporation is created to administer the charity; no seminary of learning is instituted in order to be incorporated, but the corporate character is conferred to subserve the purposes of education. No city was ever built with the sole object of being incorporated, but is incorporated as affording the best means of being well governed. The power of creating a corporation is never used for its own sake, but for the purpose of effecting something else. *No sufficient reason is, therefore, perceived why it may not pass as incidental to those powers which are expressly given, if it be a direct mode of executing them.*" (*McCulloch* vs. *The State of Maryland*, (4 Wheaton, 407.)

He next proceeded to show that the question as to what are appropriate means to be used in executing express powers is a political question to be determined by Congress, and finally declared that the act creating the United States bank was constitutional. In view of the conclusion reached there can be no question as to the power of Congress to create the corporations which have constructed the Pacific railroad and telegraph lines as instrumentalities to that end, if Congress had the power to cause them to be constructed and maintained at all.

Upon the latter question the great men of the nation have spoken, and their views have become the acknowledged con-

struction of the Constitution and the settled policy of the Government.

It is true that at an early day in the constitutional history of the country there were those who, contending for a strict construction of the Constitution, claimed that the power "to establish post offices and post roads" was only a power to direct where post offices shall be kept and on what roads the mails shall be carried, and did not include the power to establish or construct a post road where none existed. But this claim has been scouted from the commencement and its fallacy exposed by the leading minds of the country, and the uniform practice of the Government has been contrary to it. (2 Story on the Constitution section 1128 *et sequens.*) At sections 1137, 1138, and 1139 the author says:

"SEC. 1137. The fact, if true, that Congress had not made any roads for the carrying of the mail would not affect the right or touch the question. It is not doubted that the power is properly carried into effect by making certain State roads post roads. When Congress found those roads suited to the purpose, there could be no constitutional reason for refusing to establish them as mail routes. The exercise of the authority was clearly within the scope of the power. But the argument would have it that because this exercise of the power clearly within its scope has been hitherto restrained in making existing roads post roads, therefore Congress cannot proceed constitutionally to make a post road where no road now exists. This is clearly what lawyers call a *non sequitur*. It might with just as much propriety be urged that, because Congress had not hitherto used a particular means to execute any other given power, therefore it could not now do it. If, for instance, Congress had never provided a ship for the navy except by purchase, they could not now authorize ships to be built for a navy, or *a converso*. If they had not laid a tax on certain goods it could not now be done. If they had never created a custom-house or a court-house, they could not now do it. Such a mode of reasoning would be deemed by all persons wholly indefensible.

"SEC. 1138. But it is not admitted that Congress has not exercised this power with reference to this very object. By the act of the 21st of April, 1806 (Ch. 41), the President was authorised to cause to be opened a road from the frontier of Georgia, on the route from Athens to New Orleans, and to cause to be opened a road or roads through the territory then lately ceded by the Indians to the United States from the river Mississippi to the Ohio and to the former Indian boundary line, which was established by the treaty of Greenville, and to cause to be opened a road from Nashville, in the State of Tennessee, to Natchez, in the Mississippi Territory. The same remark applies to the act of 29th March, 1806 (Ch. 19), 'to regulate the laying out and making a road from Cumberland, in the State of Maryland, to the State of Ohio.' Both of these acts were passed in the administration of President Jefferson, who, it is well known, on other occasions maintained a strict construction of the Constitution.

"SEC. 1139. But, passing by considerations of this nature, why does not the power to establish post offices and post roads include the power to make and construct them when wanted, as well as the power to establish a navy, hospital, or a custom-house a power to make and construct them? The latter is not doubted by any person; why, then, is the former? In each case the sense of the ruling term 'establish' would seem to be the same; in each the power may be carried into effect by means short of constructing or purchasing the things authorized. A temporary use of a suitable site or buildings may possibly be obtained, with or without hire. Beside, why may not Congress purchase or erect a post office building and buy the necessary land, if it be in their judgment advisable? Can there be a just doubt that a power to establish post offices includes this power just as much as a power to establish custom-houses would to build the latter? Would it not be a strange construction to say that the abstract office might be created, but not the *officiana*, or place where it could be exercised? There are many places peculiarily fit for local post offices where no suitable building might be found. And if a power to construct post office buildings exists, *where is the restraint upon constructing roads?*"

At sections 1149 and 1150 the learned author points out

the distinction between a post road and a canal, military or other road, showing that the power to construct the former is an express power, while the power to construct the latter is to be found among the implied powers of Congress; and that the former may exist, or may not, as a concurrent power in the States; but that whether it does or not is a matter of little practical consequence, as "it is highly improbable that any State will attempt any exercise of the power, considering the difficulty of carrying it into effect, without the co-operation of Congress."

If Congress may cause a wagon road to be constructed for use as a post road, it is assumed that no one will contend that it may not also construct a railroad for a like purpose. It is assumed that even the strictest of the strict constructionists will not deny to Congress the right to employ, in the execution of any of its powers, the latest and most improved means which science, invention, or discovery has placed at the service of all. It is assumed that no one will deny to Congress the power to substitute the railroad of to-day, with its engine and cars, for the mud road and horse coaches in use at the time the Constitution was adopted; or a wire in place of the mail-bag; or the tappings of the telegraph in place of the ink-marks of the penman.

Although all-sufficient for that purpose, the power "to establish post offices and post roads is not the only power to which the authority of Congress to construct and maintain railroad and telegraph lines may be referred. It may be referred to the power "to provide for the common defence and general welfare of the United States," of which, as said by Story (section 1273), "the true test is whether the object be of a local character and local use, or whether

it be of general benefit to the States." In point of locality the object may be local; yet, if the benefit to be derived therefrom be general, the power exists. If, in the exercise of its powers, the General Government may blow up Blossom Rock, in the Bay of San Francisco, or Flood Rock, in the Bay of New York, who will deny it the power to construct a railroad? A railroad and telegraph line which extends two thousand miles through several States and Territories is neither local in site nor in benefit. It requires no argument to show that a railroad and telegraph line is a wise if not an indispensable provision for the common defence, or that it is calculated to promote the general welfare of the United States. It provides for the common defence by furnishing prompt and speedy transportation of troops and munitions of war. It is an improved substitute for ambulances, baggage-wagons, and forced marches. It promotes the general welfare by supplying to foreign and inland commerce vastly increased facilities for the transmission of intelligence and the exchange of commodities. If, in the furtherance of such objects, as all concede, Congress may build forts, establish arsenals, improve harbors, clear out obstructions in navigable streams, and erect light-houses, why may not Congress construct a pathway for not only the commerce of all the States, but for the commerce of all the world, by which the wealth and the prosperity of the whole country may become vastly increased and promoted?

The power is also incidental to the power "to make war," to "suppress insurrections and repel invasions," and "to raise and support armies." If, as held by Chief Justice Marshall in *McCulloch* vs. *The State of Maryland*, the creation of a national bank was within the power of Con-

gress, because it would facilitate the transfer of the treasure of the Government from the north to the south, from the east to the west, or in the reverse order, there would seem to be no just ground for holding that it is not also within the power of Congress to construct a railroad by which, in case of insurrection or invasion, an army could be transported between points two thousand miles apart in less than a week, or munitions and supplies, in the same space of time, could be forwarded to an army already in the field.

The power of Congress to construct a military road is not questioned by Story. "Congress may authorize the laying out and making of a military road, and acquire a right over the soil for such purposes; and as incident thereo they have a power to keep the road in repair, and prevent all obstructions thereto" (section 1275). His conclusion is also the conclusion of some of the greatest minds the country has produced, and he has fortified it by the most convincing logic. The basis of the argument is, that the General Government, although one of defined and limited powers, nevertheless has, and from the nature of all governments must have, all the known and usual means of executing them, and that to deny this, in the language of Chief Justice Marshall in *McCulloch* vs. *The State of Maryland*, would be to declare the Constitution "a splendid bauble."

In the February number of the *American Law Register* (Vol. VI, p. 193), will be found an article written by Judge Redfield, which, in part, treats of the question whether Congress possesses legislative power over railroads which extend through different States. He reached the conclusion that Congress not only had the power, but ought to exercise it. No man in America has given more time, labor, and

thought to the subject of railroads and their relations to the Government and the commercial interests of the country than Judge Redfield. Accordingly, whatever he says upon the subject, has come to be regarded by the bench and bar as not inferior on the score of reason, to the best considered judgments of the courts. In the article referred to he said:

"17. And of the right of the National Government to control the railways in the country there can be no question. The transportation of troops and the munitions of war in time of civil commotion, and of the public mails at all times, are matters exclusively of national importance and concern, and they are of such magnitude as to justify the national authority in the construction of entire lines of railway at the public expense. And if the National Government may do that, then it is certain it may create corporations for that purpose, or delegate the same powers and functions to individuals, for there is nothing in the grant of power to build and operate a railway which of necessity requires it to be made to a corporation. (Bennet, J., in *Bank of Middlebury* vs. *Edgerton*, 30 Vt. R., 182.) The same view was taken in regard to the right of the National Government to charter the United States Bank. It was regarded as incidentally important and necessary to enable the Government to carry forward those governmental functions which the Constitution had delegated to them. This rule was established in *McCulloch* vs. *Maryland* (4 Wheaton, 316), *Osborne* vs. *The Bank of the United States* (9 Id., 738). And now, upon the same principle, it is held lawful and necessary for the National Government to absorb all the banking institutions in the country.

"18. But there can be no question, upon any fair principle of reasoning, that the management and control of all the railways in the country are far more important as an aid or safeguard to the national authority than that of the banks. And we believe no one will question that it would be far more important to the interests, both of the railways and the public, to have them under national supervision and control than to have the banks. We hope to see some movement made in this direction, so soon as the present all-absorbing

topics of interest at the Capital shall be satisfactorily adjusted."

In the judgment of Judge Redfield, "the transportation of troops and munitions of war, in time of civil commotion, and of the public mails at all times, are matters exclusively of national importance and concern, *and they are of such magnitude as to justify the national authority in the construction of entire lines of railway at the public expense.* And if the National Government may do that, then it is certain it may create corporations for that purpose, *or delegate the same powers and functions to individuals.*" This is precisely what Congress has done in the passage of the several Pacific railway acts.

It will be observed that Judge Redfield founds his opinion solely upon those clauses of the Federal Constitution which relate to military and postal matters. But it is quite as clear that the power may also be deduced from the clause in relation to commerce with foreign nations and among the States. That Congress has the power to construct, or cause to be constructed, railroads, and may regulate their use under the commercial clause of the Constitution, has been declared by Mr. Justice Miller in the case of *Gray* vs. *Clinton Bridge*, which will be found reported in the seventh volume of the American Law Register, at page 149. The action was brought to procure the abatement of a bridge which had been erected by a railroad company across the Mississippi river at the city of Clinton, in the State of Iowa, upon the ground that the bridge was a nuisance and an obstruction to navigation. Congress had passed an act declaring the bridge "a lawful structure and a post route." It wa scontended in argument that Congress had no power

to pass the act, and this led to an extended consideration of the power of Congress over railroads under the commercial clause of the Constitution. Mr. Justice Miller said:

"Another means of transportation, equal in importance to the steamboat, has also come into existence since the Constitution was adopted, a means by which merchandise is transported across States and kingdoms in the same vehicle in which it started. The railroad now shares with the steamboat the monopoly of the carrying trade. The one has, with great benefit, been subjected to the control of salutary congressional legislation, because it is an instrument of commerce. Is there any reason why the other should not? However this question may be answered in regard to that commerce which is conducted wholly within the limits of a State, and is, therefore, neither foreign commerce nor commerce among the States, it seems to me that when these roads become parts of great highways of our Union, transporting a commerce which embraces many States, and destined, as some of these roads are, to become the channels through which the nations of Europe and Asia shall interchange their commodities, there can be no reason to doubt that to regulate them is to regulate commerce, both with foreign nations and among the States, and that a refusal to do this is a refusal to discharge one of the most important duties of the Federal Government. As already intimated, the shackles with which the different States fettered commerce in their selfish efforts to benefit themselves at the expense of their confederates was one of the main causes which led to the formation of our present Constitution. The wonderful growth of that commerce since it has been placed exclusively under the control of the Federal Government has justified the wisdom of our fathers. But are we to remit the most valuable part of that commerce again to the control of the States, and to all the consequent vexations and burdens which the States may impose through whose territories it must be carried on? And must all this be permitted because the carrying is done by a method not thought of when the Constitution was framed?

"For myself, I must say that I have no doubt of the right of Congress to prescribe all needful and proper regulations o the conduct of this immense traffic over any railroad

which has voluntarily become part of one of those lines of inter-State communication, *or to authorize the creation of such roads*, when the purposes of inter-State transportion of persons and property justify or require it."

It will be observed that, under the reasoning of Judge Redfield and Mr. Justice Miller, Congress has legislative power over railroads which form a continuous line through different States, and therefore constitute a *commercial route between them*, irrespective of the question whether they have been constructed under State laws or not. Their reasoning recognizes no distinction between navigable streams running through different States, and railroads which do the same—no distinction between the Mississippi river and the Pacific railroads. Both are considered as the avenues of *commerce*, made available by different means, it is true, but contributing to the same purposes, which purposes are, by constitutional appointment, within the control of Congress. If this be true of railways confessedly created by the States, much more is it true of the Pacific railroads, which have been chiefly created by Congress.

It was in the exercise of these powers that Congress passed the act in relation to the Atlantic and Pacific Railroad Company (14 U. S. Stats., 292) and the act in relation to the Texas Pacific Railroad Company (16 U. S. Stats., 573). By the former a corporation was created and empowered to construct, maintain, and operate a continuous railroad and telegraph line from Springfield, in the State of Missouri, to some point, not designated, on the Pacific coast, following as near as practicable the thirty-fifth parallel of north latitude.

By the latter a corporation was created and empowered to construct, maintain, and operate a railroad from Marshall,

in the State of Texas, to San Diego, in the State of California, following as near as practicable the thirty-second parallel of north latitude. To each company large grants of public land were made to aid it in the construction of its road. The object of Congress in causing these roads to be constructed is declared in the body of each act.

The ninth section of the former provides:

"That the United States make the several conditional grants herein, and that the said Atlantic and Pacific Railroad Company accept the same, upon the further condition that if the said company make any breach of the conditions hereof and allow the same to continue for upwards of one year, then in such case, at any time hereafter, the United States may do any and all acts and things which may be needful and necessary to insure a speedy completion of the said road."

The eleventh section provides:

"That said Atlantic and Pacific railroad, or any part thereof, shall be a post route and military road, subject to the use of the United States for postal, military, naval, and all other governmental service, and also subject to such regulations as Congress may impose restricting the charges for such Government transportation."

The thirteenth section provides:

"That the directors of said company shall make and publish an annual report of their proceedings and expenditures, verified by the affidavits of the president and at least six of the directors, a copy of which shall be deposited in the office of said Secretary of the Interior, and they shall from time to time fix, determine, and regulate the fares, tolls, and charges to be received and paid for transportation of persons and property on said road, or any part thereof."

The twentieth section provides:

"That the better to accomplish the object of this act,

namely, to promote the public interest and welfare by the construction of said railroad and telegraph line and keeping the same in working order, and to secure to the Government at all times, but particularly in time of war, the use and benefits of the same for postal, military, and other purposes, Congress may, at any time, having due regard for the rights of said Atlantic and Pacific Railroad Company, add to, alter, amend, or repeal this act."

The fifteenth section of the latter act provides:

"The rates charged for carrying passengers and freight per mile shall not exceed the prices which may be fixed by Congress for carrying passengers and freight on the Union Pacific and Central Pacific railroads."

The seventeenth section fixes the time when the construction of the road shall be commenced and when it shall be completed, and concludes in these words:

"And upon failure to so complete it Congress may adopt such measures as it may deem necessary and proper to secure its speedy completion."

The nineteenth section provides:

"That the Texas Pacific Railroad Company shall be, and it is hereby, declared to be a military and post road; and for the purpose of insuring the carrying of the mails, troops, munitions of war, supplies, and stores of the United States, no act of the company nor *any law of any State or Territory shall impede, delay, or prevent the said company from performing its obligations to the United States in that regard: Provided*, That said road shall be subject to the use of the United State for postal, military, and all other governmental services, at fair and reasonable rates of compensation, not to exceed the price paid by private parties for the same kind of service, and the Government shall at all times have the preference in the use of the same for the purpose aforesaid."

In respect to the defendant in error, the eighteenth section of the former and the twenty-third section of the latter act provides as follows:

"SEC. 18. *And be it further enacted*, That the Southern Pacific railroad, a company incorporated under the laws of the State of California, is hereby authorized to connect with the said Atlantic and Pacific railroad, formed under this act, at such point near the boundary line of the State of California as they shall deem most suitable for a railroad line to San Francisco, and shall have a uniform gauge and rate of freight or fare with said road; and in consideration thereof, to aid in its construction, shall have similar grants of land, subject to all the conditions and limitations herein provided, and shall be required to construct its road on the like regulation as to time and manner with the Atlantic and Pacific railroad herein provided for.

"SEC. 23. That for the purpose of connecting the Texas Pacific railroad with the city of San Francisco, the Southern Pacific Railroad Company of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Tehachapa Pass, by way of Los Angeles, to the Texas Pacific railroad, at or near the Colorado river, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions as were granted to the said Southern Pacific Railroad Company of California by the act of July twenty-seven, eighteen hundred and sixty-six: *Provided, however*, That this section shall in no way affect or impair the rights, present or prospective, of the Atlantic and Pacific Railroad Company, or any other company.

From these provisions, it is clear that Congress has created the Atlantic and Pacific Company and the Texas Pacific Company to serve as the agents of the Federal Government in carrying into execution such of the powers of that Government as relate to postal, military, and other matters. It is equally clear that Congress has selected the defendant to serve in the same capacity. It is true that these companies are allowed to do business for the public

as well as the Government; but this circumstance does not detract from their character as the agents of the United States. If the consent of the State of California was necessary to enable Congress to select the defendant (which is denied), that State has consented in the most complete and formal manner, by an act of the Legislature. (See page 24 of this brief.) From this act it appears that the defendant, as its charter then stood, had no power to build either of the roads in question, for the right to change the line of its road and build on the routes described in the acts of Congress was thereby granted. The roads, when completed, were to be used and operated as continuous lines, having a uniform gauge and rates of freight and fare, which from time to time were to be fixed and published by the directors of the two companies.

These provisions in effect withdraw the control of these roads from the States and Territories through which they run, and manifest a clear intent on the part of Congress to subject them to the exclusive sovereignty of the United States, except in respect to the police laws of such States and Territories.

That sovereign power over the roads of the Atlantic and Pacific and the Texas and Pacific Companies resides in the United States will not be disputed. That all these transcontinental roads should be under the control of the United States no one will hesitate to admit. The requirement that they shall be of uniform gauge and have uniform rates of freight and fare make such control indispensable; so of the requirement that they shall be used and operated as continuous lines. If they, by parts, are under the control of the different States and Territories through which they run,

these important and necessary requirements may be defeated by the hostile or unfriendly action of such States and Territories. A uniform gauge is required that cars containing articles of production and commerce may pass from one road to the other and thus avoid the delay and expense of breaking bulk.

If the right to regulate these roads is vested in such States and Territories, they are vested with the power to prevent their use and to destroy that which the Government of the United States has created and selected for the purpose of carrying into execution some of its most important powers.

Suppose the State of California, in the exercise of its reserved power, should repeal the law under which the defendant was formed and now exists, and so take from the defendant its right to maintain and operate its portions of these roads, what would be the remedy of the United States for such an act? Unless they stand towards such roads in the attitude of sovereign there would be no remedy. Is it not, therefore, indispensable to the accomplishment of the purposes which led to the construction of these roads that all power to destroy the defendant or obstruct it in the use and management of its roads should be denied to the State of California?

Under the laws of California the defendant can exist and operate these roads for fifty years only from the date of its organization. When these fifty years have expired what will become of these roads? Congress intended they should exist for all time, and will any one pretend that they will not, after the expiration of fifty years, continue to exist and

continue to be operated under the franchise which has been granted by the United States?

The United States Bank was vastly less needful to the Government of the United States than these trans-continental roads. That was a mere fiscal agent through which the financial transactions of the Government were effected. These roads are the means by which the mails, troops, and army and naval supplies are transported from place to place.

In times of insurrection and war they are absolutely indispensable.

Yet it has been held by this Court, in the case of *McCulloch* vs. *Maryland* (4 Wheaton, 400), that the State of Maryland had no power to impose a trifling stamp tax upon the paper upon which the bills or notes of the bank were printed. The reason assigned was that such a tax was a tax upon the operations of the bank, and, therefore, calculated to retard, impede, and burden the constitutional measures of Congress adopted for the purpose of carrying into effect certain governmental powers of the United States, and that such a result was destructive to the supremacy of the Federal Government, and, therefore, not to be tolerated.

In the course of his opinion Mr. Chief Justice Marshall used the following language:

"We must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the States.

"It is admitted that the power of taxing the people and their property is essential to the very existence of the Government, and may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the Government may choose to carry it. The only security against the abuse of this power is found in the structure of

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the Government itself. In imposing a tax the Legislature acts upon its constituents. This is, in general, security against erroneous and oppressive taxation.

"The people of a State, therefore, give to their government a right of taxing themselves and their property, and, as the exigencies of a government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator and on the influence of the constituents over their representatives to guard them against its abuse; but the MEANS employed by the Government of the Union have no such security, nor is the right of a State to tax them sustained by the same theory.

"Those means are not given by the people of a particular State, nor given by the constituents of the Legislature, which claims the right to tax them, but by the people of all the States. They are given by all for the benefit of all, and upon theory should be subjected to that government only which belongs to all." (Pp. 428, 429.) * * * "There is no express provision for the case; but the claim has been sustained on a principle which so entirely pervades the Constitution; is so intermixed with the materials which compose it; so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds. This great principle is that the Constitution, and the laws made in pursuance thereof, are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them." (P. 426.) * * * "That the power of taxing it (the bank) by States may be exercised so as to destroy it is too obvious to be denied; but taxation is said to be an absolute power which acknowledges no other limits than those expressly prescribed in the Constitution, and, like sovereign power of every other description, is trusted to the discretion of those who use it; but the very terms of this argument admit that the sovereignty of the State in the article of taxation itself is subordinate to and may be controlled by the Constitution of the United States. How far it has been controlled by that instrument must be a question of construction. In making this construction no principle not declared can be admissible which would defeat the legitimate operations of a supreme government. It is the very essence of supremacy to remove all obstacles to its action in its own sphere, and so to modify every power vested in subordinate governments as to exempt

its own operations from their own influence. This effect need not be stated in terms. It is so involved in the declaration of supremacy, so necessarily implied, that expressions of it could not make it more certain." (427.)

* * * * * * *

"We find, then, on a just theory, a total failure of this original right to tax the means employed by the Government of the Union for the execution of its powers. The right never existed, and the question whether it has been surrendered cannot arise." (p. 430.) * * *

"The power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. * * * The Legislature of the Union alone, therefore, can be trusted by the people with the power of controlling measures, which concern all, in the confidence that it will not be abused. * * * The question is, in truth, a question of supremacy; and, if the right of the State to tax the means employed by the General Government be conceded, the declaration that the Constitution, and the laws made in pursuance thereof, shall be the supreme law of the land is an empty and unmeaning declamation." The judges were unanimous in the conclusion "that the States have no power, by taxation or otherwise, to RETARD, IMPEDE, BURDEN, or in any manner control the operations of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government." (P. 436.)

The case cited was followed by the case of *Osborn* vs. *U. S. Bank* (9 Wheaton, 738). The State of Ohio had imposed upon the bank a license tax upon its business. In that case the same conclusion was reached as in the former case, and it was placed upon the same grounds.

In the opinion delivered in the last case occurs the following emphatic language:

"That to tax its faculties, its trade, and occupation is to tax the bank itself; to destroy or preserve the one is to destroy or preserve the other."

By this I understand that there is no difference between a tax upon the franchises, the corporate faculties of the agent or instrument, and a tax upon its operations. The latter was declared unconstitutional in *McCulloch* vs. *Maryland* and the former in *Osborn* vs. *U. S. Bank.*

In the latter case it was said:

"We do not maintain that the corporate character of the bank exempts its operations from the action of State authority. If an individual were to be endowed with the same faculties, for the same purpose, he would be equally protected in the exercise of those faculties.

"The operations of the bank are believed not only to yield the compensation for its services to the Government, but to be essential to the performance of these services. * * * The business of the bank constitutes its capacity to perform its functions as a machine for the money transactions of the Government. Its corporate character is merely an accident, which enables it to transact that business more beneficially.

"Were the Secretary of the Treasury to be authorized by law to appoint agencies throughout the Union to perform the public functions of the bank, and to be endowed with its faculties as a necessary auxiliary to those functions, the operations of those agents would be as exempt from the control of the States as the bank, and not more so. If, instead of the Secretary of the Treasury, a distinct office were to be created for the purpose, filled by a person who should receive as a compensation for his time, labor, and expense the profits of the banking business, instead of other emolument, to be drawn from the treasury, which banking business was essential to the operation of the Government, would each State in the Union possess a right to control those operations?

"The question on which this right would depend must always be: Are these faculties so essential to the fiscal oper-

ation of the Government as to authorize Congress to confer them? Let this be admitted, and the question, Does the right to preserve them exist? must always be answered in the affirmative." (863, 864.)

Next in order comes the case of *Weston* vs. *Charleston* (2 Peters, 449). The city of Charleston levied a tax of twenty-five cents on each one hundred dollars of the six and seven per cent. stock of the United States owned by residents of the city.

The case was held to be within the rule, in *McCulloch* vs. *Maryland*. On the argument, it was admitted on the part of the city that the States cannot tax any of the means or instruments of the Federal Government, but it was claimed that the inhibition applied only to such taxes as were laid directly upon such means, and did not include those which only consequentially affected them. In answer, the court ruled that it made no difference whether the action of the States affected such means directly or indirectly, and that in either case the State law must be held void.

The next case, in order of time, is Dobbins' case (16 Peters, 435). Dobbins was an officer of the navy and engaged in the revenue service of the United States. He was a resident of Pennsylvania. That State passed a law taxing "all offices and posts of profit." Dobbins contested the right of the State to tax his office, on the ground that he was a United States officer. He was defeated in the State courts, and thereupon brought his case to this court, where he was successful. In rendering its judgment, this court said:

"Taxation is a sacred right, essential to the existence of government and the incident of sovereignty. The right of legislation is coextensive with the incident to attach it upon the persons and property within the jurisdiction of a State,

but in our system there are limitations upon that right. There is a concurrent right of legislation in the State and the United States, except as both are restrained by the Constitution of the United States. Both are restrained upon this subject by express prohibitions in the Constitution, and the States by such as are necessarily implied when the exercise of a right by the State conflicts with the perfect execution of another sovereign power delegated to the United States. *That occurs when taxation by a State acts upon the instruments, emoluments, and persons which the United States may use and employ as necessary and proper means to execute their sovereign power.* * * * * *

"The unconstitutionality of the tax in question might be safely put—though it is not the only ground—upon its interference with constitutional means which have been legislated by the Government of the United States, to carry into effect its powers to lay and collect duties, taxes, imposts, etc., and to regulate commerce. In our view it presents a case of as strong interference as was presented by the tax imposed by Maryland, in the case of McCulloch, 4 Wheaton, 316, and the tax of the city council of Charleston, in Weston's case, 2 Peters, 449, in both of which it was decided by this court that a State cannot lay a tax upon the constitutional means employed by the Government of the Union to execute its constitutional powers." (429.)

The next case in point of time, in which this question was considered, is that of *Thompson* vs. *Pacific Railroad* (9 Wallace, 579). The tax in that case was laid upon the railroad, rolling-stock, and other tangible property of the defendant. It was claimed that such property was exempt from State taxation upon the ground that the defendant had been selected by Congress as an agent or means of the Federal Government within the rule in question. This court stated the question to be, "Can the right of this road to exemption from such taxation be maintained in the absence of any legislation by Congress to that effect?" In answering this question this court said:

"We fully recognize the soundness of the doctrine that no State has the right to tax the means employed by the Government of the Union for the execution of its powers; but we think there is a clear distinction between the means employed by the Government and the property of agents employed by the Government. *Taxation of the agency is taxation of the means;* taxation of the property of the agent is not always nor generally taxation of the means." (P. 691.)

In the case cited we have a suggestion, thrown out for the first time, so far as I am advised, that the power of the States to tax the United States agents, means, or instruments may depend upon the will of Congress.

Whether such a doctrine be sound or not is not material, so far as the decision of this case is concerned, for Congress has never agreed that the property or franchises of the defendant may be taxed by the State of California; but it may not be out of place to enter a protest against a theory which, in my judgment, is unsupported by reason.

The power of taxation is vested in the States, without conditions or limitations except such as are found in their own constitutions or in the Constitution of the United States. No power is vested in Congress to determine what property or franchises shall or shall not be taxed by the States. A State may tax everything within its jurisdiction, in respect to which it stands in the attitude of sovereign. If a given thing be beyond the reach of its taxing power, it is not because Congress has so declared, but because the Constitution of the United States forbids, either expressly or by implication. The existence of a power in the States to tax the property, or agencies, or instrumentalities of the Government of the United States is incompatible with the existence of the latter. The law of self-preservation, there-

fore, requires that the States shall not be allowed to exercise any control over agencies and instrumentalities selected and employed by it in carrying into execution any of its constitutional powers. Nor does Congress possess the power to consent to taxation, by the States, of the property or instrumentalities of the United States. All such acts are unconstitutional and void. Congress has no power to resign in favor of the States the sovereignty or supremacy of the United States.

Never before had the idea that Congress had power over this question suggested itself to the mind of this court. Congress did not prohibit the States from taxing the United States Bank, nor the stocks of the United States, nor the salaries of United States officers; nor had the States prohibited the United States from taxing the salaries of their officers, yet all these taxes were declared illegal by this court.

In the case last cited some stress seem to have been placed upon the fact which the court assumed, that the defendant was a State and not a national corporation. Whether it was a national or a State corporation was wholly immaterial. The exemption claimed does not depend upon the legal status of the party putting it forward towards the national or State governments, nor upon the fact whether such party be a corporation or a natural person, but upon the fact that such party has been selected as an agent or instrumentality. This had been very clearly stated in *Osborn* vs. *U. S. Bank,* where it was said:

"We do not maintain that the *corporate* character of the bank exempts its operations from the action of the State authority. If an individual were to be endowed with the

same faculties for the same purpose he would be equally protected in the exercise of those faculties." (9 Wheaton, 863.)

This view of the question was followed in the next and last case upon this subject (*Railroad Company* vs. *Peniston*, 18 Wallace, 5), where it was said:

"When the case is as in the present case, whether the taxation of property is a taxation of means, instruments, or agencies by which the United States carries out its powers, it is impossible to see how it can be pertinent to inquire whence the property originated, or from whom its present owners obtained it. The United States have no more ownership of the road authorized by Congress than they have in the road authorized by Kansas. If the taxation of either is unlawful, it is because the State cannot obstruct the exercise of national powers." (P. 34.)

Referring to the case of *Weston* vs. *Charleston* this court further said in the case last cited:

"As was said in *Weston* vs. *Charleston*, they (the States) cannot, by taxation or otherwise, retard, impede, burden, or in any manner control the operation of the Constitutional laws enacted by Congress to carry into execution the powers vested in the General Government. The implied inhibition, if any exists, is against such obstruction, and that must be the same, whether the corporation whose property is taxed was created by Congress or by a State Legislature."

This court then proceeds to show that in the case of *McCulloch* vs. *Maryland* and also in the case of *Osborn* vs. *U. S. Bank*, a distinction was drawn between the right of the State to tax the operation or faculties of the agent, or instrumentality, and their right to tax tangible property belonging to such agent, and adds:

"It is therefore manifest that exemption of Federal agencies from State taxation is dependent not upon the nature of the agents, or upon the mode of their constitution, or

upon the fact that they are agents, but upon the effect of the tax—that is, upon the question whether the tax does in truth deprive them of power to serve the Government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect; it leaves them free to discharge the duties which they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of the Federal power."

And further on it is said:

"In this case the tax is laid upon the property of the railroad company precisely as was the tax complained of in *Thompson* vs. *The U. P. R. R. Co. It is not imposed upon the franchises or the right of the company to exist and perform the functions for which it was brought into being.*"

The distinction drawn in the foregoing cases between taxing the business or faculties of the agent and taxing tangible property, which may not be only useful but indispensable to such agent in performing the duties imposed by Congress, has never seemed to me to be substantial. Without paper the United States Bank could not print and put in circulation its bills or notes, and so it was held that a State stamp tax on that paper was void, because it retarded, impeded, and burdened the operations of the bank, and therefore impeded, retarded, and burdened the operation of laws made by Congress to carry into effect the constitutional powers of the Government of the United States in relation to matters of finance.

A State license tax upon the business of the bank was also held void for the same reason.

The defendant in this case has been selected to construct, maintain, and operate a railroad as a post and military road, vastly more necessary and useful to the Government than

was the Bank of the United States. The end to be subserved was the prompt and expeditious transportation of mails, troops, and munitions of war. This duty is imposed upon the defendant, and it cannot be performed without the aid of its railroad, rolling-stock, &c. To the performance of these duties engines and cars and an iron track for them to run upon is quite as essential as paper was to the operations of the United States Bank, and any interference by a State with them, which might deprive the defendant of their use, would be, as it seems to me, quite as effectual as a tax on paper in retarding, impeding, and burdening the operation of the constitutional laws of Congress. But be this as it may, it is held in all of the foregoing cases that the franchise of defendant—its right to exist and carry on the business in which it is employed—is exempt from State taxation.

In *Railroad Company* vs. *Peniston* the tax was held valid because it was "not imposed upon the franchises or the right of the company to exist and perform the functions for which it was brought into being." That the tax in that case would have been held invalid had it been imposed upon the franchises of the company, the reasoning of the court leaves no room for doubt.

In its relation to the Federal and State governments this defendant occupies the same position which the Kansas Pacific railway occupies. The Kansas Pacific railway Company was organized under the territorial law of Kansas and was adopted by Congress as one of its agents for the purpose of constructing and operating one of the lines of railroad authorized by the act of Congress of July 1st, 1862. In a recent case decided by this court the relation of the

Kansas Pacific Railway Company to the Government of the United States came up for consideration. (Pacific Railroad Removal Cases, 115 U. S. R'p'ts, p. 2.) It was there substantially held that, notwithstanding that company had been incorporated under a territorial law, it was, in view of the use to which it had been put by the United States, to be treated as a United States corporation, and that its franchises to exist, construct, and operate its road had been derived from the United States. If this be so it is clear that defendant has derived all of its franchises, of which it is in use, from the Government of the United States, and those franchises are held by it subject to the will of Congress, the same as in the case of the Atlantic and Pacific and Texas Pacific Companies. It is absurd to say that Congress has less control or power over and in respect to its railway and franchises than it has over the Texas Pacific or Atlantic and Pacific. They are all parts of one whole which was organized by Congress, and which Congress has declared shall be subject to its control and government, and especially in the Texas and Pacific Act has prohibited the States from passing any laws which may interfere with such control on the part of the Government of the United States.

For a further and conclusive argument upon this question I refer to the argument (printed as an appendix to this) of the Hon. Creed Haymond, who was of counsel for defendant in the court below. This argument was made in the case of the Central Pacific Company, but the conditions in the case of that company are substantially the same as in the case of the Southern Pacific Company, and the argument applies to the latter as well as the former.

V.

Corporations are Persons within the Meaning of the Fourteenth Amendment to the Federal Constitution.

Section 1 of the Fourteenth amendment reads as follows:

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

Is a corporation a "person" within the meaning of the last two clauses of this section?

The claim made on the part of the plaintiff in error, that it is not, is, to say the least, startling.

This court must hesitate to adopt the view of the plaintiff when it considers the vast number of corporations which exist in the United States, and the still greater number of stockholders, or natural persons, who have invested their money in the business carried on by such corporations. Much the larger part of the business of the country is in their hands. The insurance, the banking, the mining, the manufacturing, and the transportation business is almost exclusively carried on by corporations. These insurance companies number not less than sixteen hundred, and their aggregate assets are not less than ninety-nine million dollars. There are more than five thousand mining corporations, whose wealth cannot be estimated, but which must amount to many millions of dollars. There are more than

two thousand national banks, with assets of the value of more than two billions. There are, doubtless, a large number of other bank corporations which are not national. There are in the United States and Territories not less than fifteen hundred railroad corporations, operating in all not less than one hundred and ten thousand miles of railroad, which, with rolling-stock and other property, are of the value of not less than six billion dollars. In almost every branch of manufacturing and commercial business corporations are engaged.

The laws of the country throw open to them the entire field of business and industry, and their existence is demanded by the necessities of progress. To the conduct and management of the most important business enterprises associated capital is indispensable.

It is only by the aid of association that much of the mining, mechanical, manufacturing, insurance, banking, and transportation business can be successfully carried on.

Hence, in respect to the formation of corporations, the laws of the country have become from time to time more and more liberal, until now, in most, if not in all, of the States and Territories, associations, partaking more or less of a corporate character, are authorized to undertake and carry on all kinds of business. In almost every State and Territory, if not in all, general laws have been enacted under which corporations may be formed by the voluntary association of natural persons.

Under the general laws of California in relation to corporations, they may go into any kind of business or occupation in which natural persons may lawfully engage, and such is believed to be the case in nearly all, if not all, of the

States and Territories. It is safe to say that there are not less than a hundred thousand of these corporations in the country. There are more than five thousand in the city of San Francisco alone, and in the State of New York not less than twenty-five thousand.

In addition to these business and trading corporations, there are religious, charitable, and sanitary corporations without number scattered throughout the land.

It may be that these corporations, in respect to their property, are without the protection of these clauses of the Fourteenth amendment; it may be that the States can, if so disposed, deprive these corporations and their stockholders of their property without due process of law, and deny to them the equal protection of the laws, but before such a conclusion is reached a better foundation should be found than the emasculating construction of a word.

All through the literature of the law, written and unwritten, corporations have been recognized and treated as legal persons, and as having all the rights of natural persons in respect to such property as they may lawfully acquire and possess. From the horn-books down to the present, in all text-books, in all codes, in all statutes, in all definitions, they have been described as persons created by law. In every book or treatise upon the rights of persons a chapter has been devoted to corporations. In all statutes imposing burdens upon persons, though not specially named, they have been included. In the benefits of all laws designed for the protection of persons in the possession and enjoyment of their property they have been allowed to share. Under certain conditions they have been held to be "individuals" and to be "inhabitants" and "occupiers,"

and, under other conditions, to be "citizens," or as possessing some of the rights of citizenship.

Blackstone, treating of the rights of persons, says:

"Persons also are divided by the law into either natural persons or artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic." (Book 1, page 123.)

Chancellor Kent also treats of corporations under the head of rights of persons (2 *Kent's Com.*, 267:)

An act providing for the taxation of all personal property of the "inhabitants" of the State embraces corporations. (*Baldwin* vs. *Trustees*, 37 *Maine*, 369.) A statute providing that "no abatement shall be made of the taxes assessed upon any '*individual*' until he shall have filed with the assessor a sworn list of his estate" applies to corporations. (*Otis* vs. *Ware*, 8 *Gray*, 509.) So a tax law includes foreign corporations in the word "persons." (1 *Abb., App., Dec.* 199.)

Of the statute of Henry VIII, which provided that bridges and highways should be made and maintained by the "*inhabitants* of the city, shire, or riding," and that the collectors might "distrain every such inhabitant as should be taxed and refuse payment thereof in *his* lands, goods, and chattels," Lord Coke said:

"Every corporation and body politic residing in any county, riding, city, or town corporate, or having lands or tenements in any shire *quæ propriis manibus et sumptibus possident et habent*, are to be inhabitants there within the purview of this statute."

In *Rex* vs. *Gardner* (Cowp., 83) the poor rates, to which lands of a certain corporation were declared to be liable,

were not assessed to the actual occupant, for there was none, but to the corporation; and it was held by Lord Mansfield, overruling a *dictum* of Justice Yates, that in such cases the corporation was an *inhabitant* or *occupier* in the meaning of the law.

This comment of Lord Coke and this decision of Lord Mansfield were cited and approved by Chief Justice Marshall in the very important and leading case of the *Bank of the United States* vs. *Deveaux*, reported in 5th Cranch, at page 61. In that case the question was whether the bank, being a corporation, was entitled to sue in the circuit court of the United States by virtue of the clause in the Constitution which confers jurisdiction upon the Federal courts over controversies between citizens of different States. It was conceded that in order to maintain jurisdiction over the case both parties must be *citizens*, and it was vigorously contended by counsel that the bank could not, even for the purposes of jurisdiction merely, be held to be a citizen. But that great judge swept the cobweb from his path and held that if not a citizen the bank was an aggregation of citizens, whose rights it represented, and, as the representative of citizens, to whom the matter in controversy really belonged, it had a constitutional right to sue in the courts of the United States. The court, with emphasis, rejected the proposition that citizens lost any of their rights under the Constitution by associating themselves together in a corporate capacity.

The same question, in the reverse form, arose in the case of *Marshall* vs. *The Ohio and Baltimore Railroad Company.* (16 How., 314.) The question was whether the defendant, being a corporation created by the Legislature of Maryland,

could be compelled to submit to the jurisdiction of the circuit court of the United States; and it was held that the constitutional privilege which a citizen of one State has to sue the citizens of another State in the Federal courts, cannot be taken away by the erection of the latter into a corporation by the laws of the State where they reside.

In delivering the opinion of the court Mr. Justice Grier, among other things, said:

"A corporation, it is said, is an artificial person, a mere legal entity, invisible and intangible.

"This is no doubt metaphysically true in a certain sense. The inference, also, that such an artificial entity 'cannot be a citizen' is a logical conclusion from the premises which cannot be denied.

"But a citizen who has made a contract, and has a 'controversy' with a corporation, may also say, with equal truth, that he did not deal with a mere metaphysical abstraction, but with natural persons; that his writ has not been served upon an imaginary entity, but on men and citizens; and that his contract was made with them as the legal representatives of numerous unknown associates, or secret and dormant partners.

"The necessities and conveniences of trade and business require that such numerous associates and stockholders should act by representation, and have the faculty of contracting, suing, and being sued, in a factitious or collective name.

"But these important faculties, conferred on them by State legislation, for their own convenience, cannot be wielded to deprive others of acknowledged rights. It is not reasonable that those who deal with such persons should be deprived of a valuable privilege by a syllogism, or rather sophism, which deals subtly with words and names, without regard to things or persons they are used to represent."

In view of these authorities it will be strange, indeed, if it shall be held in this case that a corporation is not a *person*

within the meaning of these clauses of the Fourteenth Amendment, notwithstanding it is an "*inhabitant*" and an "*occupier*" under the laws of England, and an "inhabitant," an "individual," and a "person" under the laws of some of the States, and a "citizen" within the meaning of certain other provisions of the same instrument of which the Fourteenth Amendment is a part.

The case of the *United States* vs. *Amedy* (11 Wheaton, 932), was a criminal prosecution under an act of Congress which, among other things, provides "That if any person shall, on the high seas, willfully and corruptly cast away, burn, or otherwise destroy, any ship or vessel of which he is owner in part or in whole, or in anywise direct or procure the same to be done, with intent or design to prejudice any *person* or *persons* that hath underwritten or shall underwrite, any policy or policies of insurance thereon," &c. * *

The underwriters were a corporation incorporated by the Legislature of Massachusetts under the name of the Boston Insurance Company, and the point made on the part of the defendant was that a corporation was not a *person* within the meaning of the act. Here was a case of criminal law where the life of the defendant was at stake, and where strictness is the rule of construction, yet the Court held that the Boston Insurance Company was a *person* within the meaning of that act.

Mr. Justice Story, delivering the opinion of the Court, among other things, said:

"Another question not raised in the Court below has been argued here and upon which, as it is vital to the prosecution, we feel ourselves called upon to express an opinion. It is, that a corporation is not *a person* within the meaning of the act of Congress. If there had been any settled course of

decisions on this subject in criminal cases, we should certainly, in a prosecution of this nature, yield to such a construction of that act, but there is no such course of decisions. The mischief intended to be reached by the statute is the same whether it respects private or corporate persons. *That corporations are in law for civil purposes deemed persons is unquestionable.*"

The case of *Society, &c.*, vs. *New Haven* (8 Wheaton, 464), arose under the treaty of peace between the United States and Great Britain.

The sixth article of the treaty provided "That there should be no future confiscation made nor any prosecution commenced against any *person* or *persons* for or by reason of the part which *he* or *they* may have taken in the war, and that no *person* should, on that account, suffer any future loss or damage either in *his* person, liberty, or property."

An English corporation, before the war, had owned lands in Vermont which the Legislature of that State had confiscated and granted to the town of New Haven.

The corporation invoked the treaty for its protection, and the question was whether it was a "person" within the meaning of the sixth article. It was insisted, on the part of the town, that the corporation was not a *person* within the meaning of the treaty, and that the use of the *pronouns* "he," "they," and "his" were conclusive of that question, even if a corporation could, in any case, be considered a person. But this logic was rejected by the Court.

The authorities upon this question are numerous:

In the case of *The People* vs. *Utica Insurance Company* (15 Johnson, 508), the supreme court of New York held that a statute restraining any person from doing certain acts applied equally to corporations or bodies politic, although not mentioned.

In *Planters' Bank* vs. *Andrews* (8 Porter, 404), it was held that a corporation was a person within the meaning of the attachment laws of Alabama.

In *The State* vs. *Nashville University* (4 Humphreys, 166), it was held that a corporation fell within the meaning of the word "person," in a statute which directed the land office to be opened for the reception of entries by all and every person or persons.

In *Munn* vs. *Illinois* (94 U. S., 103), it is held that while this clause in the Fourteenth Amendment is new in the Constitution of the United States, as a limitation upon the powers of the States, it is old as a principle of civilized government; and, as the Constitution contains no definition of the words used, their signification must be determined by ascertaining the effect which usage has given to them when employed in the same or in like connection.

In *Sinking Fund Cases* (99 U. S., 718), Chief Justice Waite, delivering the opinion of the Court, says:

"The United States cannot, any more than a State, interfere with private rights, except for legitimate governmental purposes They are not included within the constitutional prohibition which prevents States from passing laws impairing the obligation of contracts; but, equally with the States, *they are prohibited from depriving persons or corporations of property without due process of law.*"

I have said that corporations are included in the word "person" by all legal definitions in the books, codes, and statutes.

Mr. Kyd, in his work on corporations, says: "A corporation is a political person capable, like natural persons, of enjoying a variety of franchises" (page 15, vol. I), and so say all writers upon the law of corporations.

The Revised Statutes of the United States provide that the word person "may extend and be applied to corporations." (Chap. 1, sec. 1.)

In all the codes of California it is declared that "the word person includes corporations." (Political Code, sec. 17; Civil Code, sec. 14: Code of Civil Procedure, sec. 17; Penal Code, sec. 7.)

In the case of *Douglas* vs. *Pacific Mail Steamship Company* (4 Cal., 304), the supreme court of California held that the word person, in its legal sense, is a generic term, and was intended to include artificial as well as natural persons. In that case it had been argued in the court below that the 30th section of the act of the Legislature of California, defining the manner of commencing civil actions, applied to natural persons alone. This argument was based upon the fact that there were in the practice act of the State various provisions which could not be made applicable to corporations, and therefore a corporation was not a person within the meaning of that act.

These judicial and legal definitions were well known to the lawyers and statesmen who framed the Fourteenth Amendment, and it is to be presumed that they used the word "person" in its broadest legal sense. Had a layman in Congress proposed to amend by inserting in these two clauses the word "corporation," every lawyer in the two houses would have informed him that the legal definition of the word "person" included corporations in all cases where the word "corporation" might be appropriately inserted. If corporations have been excepted from the operation of these clauses of the Fourteenth Amendment the exception finds no support in reason. On the contrary, the

history of the times shows that they, above all others, stand in need of protection against the hostility of the States. The constitution of California was changed in 1879, among other reasons, for the openly avowed purpose of imposing exceptional and discriminating burdens upon railroad and other *quasi* public corporations, and should the judgment in this case be reversed, that purpose will have been accomplished.

The cases in which this precise question is considered are not numerous. Some of them give color to the contention of the plaintiff in error.

Insurance Co. vs. *New Orleans* (1 Wood, 85).
C. P. R. Co. vs. *State Board of Equalization* (60 Cal., 35).
People vs. *C. & A. R. Co.* (6 Chicago Legal News, 280).

There are other judges who have given a more reasonable construction to this provision of the constitution.

In the case of *Northwestern Fertilizing Company* vs. *The Town of Hyde Park* (3 Bissell, 480), Judge Drummond reached the opposite conclusion. The case arose under the first section of the act of Congress of the 20th of April, 1871, enacted to give effect to the Fourteenth Amendment. That section declares "that any person who, under the color of any law, statute or ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any *person* within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States shall," &c., and the question was whether the complainant, being a corporation, was a "person" within the meaning of that section.

Judge Drummond, among other things, said: "It seems to me it would be 'sticking in the bark' to hold that the

right of a person in relation to his property should be protected under these provisions of the Constitution and law where he was simply an individual, and the rights of the same person as to property as a member of a corporation should not be protected."

A stockholder in a corporation holds an undivided interest in all property possessed by such corporation. While the corporation continues to exist he receives a portion of its dividends or earnings. Upon a dissolution of the corporation each stockholder is entitled to a share of the assets after the debts of the corporation have been paid.

This right to share in the dividends and in the distribution of the assets is property. It has a commercial and exchangeable value. It passes by transfer of shares from individual to individual. Upon the death of the owner it descends, like his other property, to his heirs.

It is for these reasons that stockholders' bills are entertained by the courts, which always, in proper cases, interpose for the protection of the stockholder's interest in the property of the corporation against the abuse of power by its directors or managers.

The stockholder, therefore, is as much entitled to be protected in the enjoyment of such property as he is to be protected in respect to other property of which he is the owner. It certainly was not intended by the Fourteenth Amendment to discriminate between different kinds of property. Every person, under that amendment, is guaranteed protection, as to *all* his property, whatever may be its legal status—whether the title be in himself or in another for his benefit. The State cannot, therefore, take the property of the corporation without also taking the interest of the stockholders in it, and

for that reason, in order to carry out the letter and spirit of the Fourteenth Amendment, the protection which it affords must of necessity be extended to the corporation.

The fallacy of the construction contended for on behalf of the plaintiff in error is forcibly illustrated by a transaction which recently occurred in San Francisco. As I have already stated, corporations are formed under general laws in California, and they are empowered to engage in any business in which natural persons may lawfully engage. The following appeared in the papers:

"The old firm of Merrill, Holbrook, Stetson & Hurd will hereafter continue their business under the corporate name of Merrill, Holbrook, Stetson & Hurd, each member contributing to the corporation the same capital he had in the firm."

While these parties remained members of the partnership they were in the enjoyment of the full protection of the Fourteenth Amendment; but, under the construction of counsel upon the other side, the moment they erected themselves into a corporation they lost all claim to protection under its provisions.

The construction for which I contend may be sustained by other reasons equally cogent.

The word "person," in the two clauses in question, means the same thing in each clause.

This cannot be denied by any one. The second is new in constitutional law, but is of familiar countenance in the early history of the United States. It is found in the Declaration of Independence, and has been made the corner-stone of American institutions.

The first has come down to us from *Magna Charta*. It has been a part of the laws of England for more than six hundred years.

In one form or another it has always been a part of American constitutional law. It has been again and again expounded by law writers and by judges, for it is found in every State constitution and in the Constitution of the United States. (5th amendment.) As found in these constitutions it contains no mention of corporations. The word "person" only is used. "No person" shall, &c., or "nor shall any person," &c., are the words used.

Yet it never has been held by any court, national or State, or declared by any commentator, that corporations are not under its protection. On the contrary, on every occasion where the question has been made, or an opportunity to make it has been offered, it has been expressly or tacitly decided that corporations are *persons*, and entitled to due process of law. When, therefore, the words of this clause were incorporated into the Fourteenth Amendment it must be presumed that they were used in a sense as comprehensive as that which had been accorded to them in practice and by interpretation for centuries.

Our construction also finds support in the every-day application of the constitutional provision in relation to the exercise of the power of eminent domain.

Private property cannot be taken for public use without compensation. The property of corporations is private property, and cannot, therefore, any more than the property of natural persons, be taken for public use without compensation. Some of the courts have gone so far as to hold that the property of a municipal or public corporation cannot be

taken by the State for public use without compensation. (*City of Detroit vs. Detroit and Howell Plank Road Company*, 43 Mich., 140.) To say that the property of a corporation cannot be taken for public use without compensation, but that such corporation may be deprived of its property without due process of law, would be anomalous. That such an anomaly exists in the constitutional law of this country is not worthy of belief.

VI.

The Pretended Act of the Legislature Amending Section 3664 of the Political Code not having been Passed by a Majority of all the Members of the Assembly is not Law and Cannot be Considered in Deciding any Point Involved in this Case.

The facts as to the passage of this bill are found from both the printed and written journal of the Assembly by the court below. (See *ante*, p. 13.) It appears from the printed journal that forty-one persons voted in favor of the adoption of the Senate amendment, although the summing up at the foot shows only thirty-nine. If forty-one voted the amendment was constitutionally adopted. The written journal shows that only forty members voted in favor of the adoption of the amendment. The summing up of the vote, however, is the same as in the printed journal. Of course, in case of a variance between the printed and written journal, the latter must be taken to be the better evidence. That shows that only forty members voted in favor of the amendment, and therefore the amendment was not constitutionally adopted.

That no bill can become a law in California unless it has

been concurred in by a majority of the members elected to each house of the Legislature is not a debatable question. The constitution of that State, as we have seen, expressly provides that it shall not. In this connection the only debatable question is, whether the courts can go behind the statute itself, and trace its history through the two houses of the Legislature, for the purpose of determining the fact whether on its final passage it received the sanction of a majority of the members elected to each house. In England and in some of the American States, where the constitution contains no such or similar provisions in relation to the keeping of journals, and voting by yeas and nays on the final passage of bills, &c., it has been held that no such inquiry can be had. But it is now well settled that under such provisions as are found in the constitution of California that it is the duty and the business of the courts, whenever the validity of a statute is challenged upon the ground in question, to look to the history of the statute as recorded in the journals of the Legislature. These journals are better evidence than the statute itself when certified to by the presiding officers of the two houses, signed by the Governor, and deposited in the office of the secretary of State. They are official public records or writings which the law requires to be kept and published, and of which courts and judicial officers must take notice. Public writings, under the Code of Civil Procedure of California, include the journals of the Legislature.

Section 1888 provides: "Public writings are the written acts or records of the acts of the sovereign authority of official bodies and tribunals, and of public officers, legisla-

tive, judicial, and executive, whether of that State, of the United States, of a sister State, or of a foreign country."

* * * * * * *

Subdivision 2 of section 1918 of the same code puts legislative journals upon the same level as evidence as the published statutes. It provides "that the proceedings of the Legislature may be proved by the journals of that body, or either house thereof, or by published statutes or resolutions." Section 1875 of the same code requires courts to take judicial notice, among other things, "of public and private acts of the legislative, executive, and judicial departments of the State and of the United States, and to that end they may resort for information to appropriate books or documents of reference."

Section 255 of the Political Code of that State requires "the minute clerk of the Senate and the minute clerk of the Assembly to keep a correct record of the proceedings of their respective houses." Section 256 requires the "journal clerk of the Senate to record each day's proceedings in the journal, from which they must be read by the secretary each day of meeting, and then be authenticated by the signature of the President." Section 257 requires "the journal clerk of the Assembly to record each day's proceedings in the journal, from which they must be read by the clerk each day, and then be authenticated by the signature of the Speaker."

In view of these various constitutional and statutory provisions it is obvious, whatever may be the rule elsewhere, that in California the courts not only may, but must, resort to the journals of the Legislature for the purpose of declaring whether an apparent statute, the validity of which is

made a question, has been enacted in the manner and by the vote required by the constitution.

It is the business and duty of the courts to find and declare the law.

It is their duty to find and declare the common law; and it is no less their duty to find and declare the statutory or written law. In their search they not only may, but must, consult all such books and records, as the law requires to be kept and authenticated, which afford any legal testimony or information upon the subject.

These constitutional provisions clearly show an intention on the part of the framers of the Constitution not to rest the fact of the passage of bills upon the testimony of the presiding officers of the two houses of the Legislature and the Governor. The unwritten history of legislative bodies shows that bills are sometimes ripened into laws by fraudulent and illegal methods. Being aware of this, the framers of the later American constitutions have provided other means and other testimony by which the existence and validity of a law may be tried. To do so was idle and futile, if such means and testimony are to remain as a sealed book, and unaccessible to the courts, who alone are allowed to declare what is and what is not law.

These views have been everywhere sustained by the courts, where the legal conditions are the same or similar to those which exist in California.

In *De Bow* vs. *The People*, it is said that all doubt upon the subject had been resolved by the court for the correction of errors, and that it was then settled law in New York that the courts may and should, in case of dispute, go behind the published statutes and examine the engrossed bills on

file in the office of the Secretary of State and the journals kept by the two houses of the Legislature. (1 Denio, 14.)

In *Fordyce* vs. *Goodman*, the validity of a statute was contested upon the ground that it had not passed the Legislature by a constitutional majority. The court held that it would look into the journals and ascertain the state of the vote, and that not to do so would be to nullify the provisions of the constitution in relation to the passage of bills. (26 Ohio State, 17.)

In *Green* vs. *Graves* the question was whether a certain bank corporation had a legal existence, and it was held that it had not, because the statute under which it was organized did not on its final passage receive the concurrence of two-thirds of the legislature. (1 Doug., 351.)

Spangler vs. *Jacoby* is a leading case, on this subject, in Illinois. In that case the validity of an act of the legislature was contested upon the ground in question. Among other things the court said: "The act in question was signed by the speakers of the two houses, and it received the sanction of the executive. *Prima facie*, therefore, it became a law. But the journal of the House of Representatives fails wholly to show that it was ever put upon its final passage in that house. In other words, it does not appear that it passed with the concurrence of a majority of the members elect of that body. The act did not become a law in pursuance of the provisions of the Constitution, and it is therefore null and void." (14 Ill., 298.)

The case of *Prescott* vs. *Board of Trustees of Michigan Canal Company* is in all respects similar to the present case. In that case the court, by Mr. Justice Breese, said:

"Such an act is to be found in the statute book, but in

reality there is no such law in existence, and never has been. Its history is correctly stated in the agreed case, as we have ascertained by a careful examination, not only of the printed journal, but of the original manuscript journal of the session of 1851.

"A bill with this title passed the Senate and was reported to the House on the 11th of February, 1852, where, on the same day, it had two readings and was referred to the standing committee on canal and canal lands.

"On the 13th of February it was reported back, and ordered to a third reading, at which stage of the bill a member moved to strike out the third section, which was agreed to, and the bill thus amended passed the House by—yeas 53, nays 9.

"On the same day the amendment was reported to the Senate by message from the House, that 'the House' had concurred with the Senate in the passage of the following bills, to wit:

"'An act in relation to the Illinois and Michigan canal and canal lands;' amend by striking out third section. No further action of the Senate on the bill is shown by the journal; but on the same day 'Mr. Key Kendall, from the committee on enrolled bills, reported as correctly enrolled, and this day laid before the Governor, the following bill, to wit, 'An act in relation to the Illinois and Michigan canal and canal lands.'

"On the 15th of February the Governor, by his private secretary, informed the Senate by message that he had approved and signed certain bills, among them 'An act in relation to the Illinois and Michigan canal and canal lands.'

"From this department it passed, like all other bills approved, to the proper depository, the office of the secretary of State, and duly copied for the printer, with the third section remaining in it, as we find it in the statute book. This section, thus stricken out by the House, forms no part of the bill, nor has the remainder of the bill any vitality, as it did not, when amended, receive the constitutional action of the Senate. The whole thing is a nullity." (19 Ill., 326.)

These Illinois cases should have a controlling force upon this question, in view of the fact that the constitution of California is a copy of the constitution of Illinois.

In borrowing the language of Illinois, California must be presumed to have also borrowed the construction put upon it by that State.

For further authority upon this question, I refer the court to the following cases:

The State vs. *McBride*, 4 Mo., 303.
Coleman vs. *Dobbins*, 8 Tanner (Ind.), 159.
Burr vs. *Ross*, 19 Ark., 220.
People vs. *Coleman*, 4 Cal., 46.
Osburn vs. *Staley*, 5 West Va., 89.
The People vs. *Mahoney*, 13 Mich., 481.

In this last case it was held that as the courts are bound judicially to take notice of what the law is it is their duty to consult not only the printed statutes, but also the journals of the two houses of the Legislature, to enable them to determine whether the statute has been enacted in the mode and by the vote required by the Constitution. The same doctrine is held by the justices of the supreme court of New Hampshire, reported in 35 New Hampshire Reps., 579.

But this question is not new to this court. This court had occasion to deal with it in the case of *Gardner* vs. *The Collector*. The following language is found in the opinion which was delivered in that case:

"How can it be held that the judges, upon whom is imposed the burden of deciding what the legislative body has done, when in dispute, are debarred from resorting to the written record which that body makes of its proceedings, in regard to any particular statute. * * * We are of opinion, therefore, on principle as well as authority, that whenever a question arises in a court of law of the existence of a statute, or of the time when a statute took effect, or of the precise terms of a statute, the judges who are called

upon to decide it have a right to resort to any source of information which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question, always seeking first for that which, in its nature, is most appropriate, unless the positive law has enacted a different rule." (6 Wall., 499.)

VII.

The Constitution and Laws of California, in the Assessment of Property, Discriminate Against quasi Public Corporations in many ways, and thereby Subject them to more Onerous Taxation than is Imposed upon other Taxpayers, and that, therefore, they Violate that Clause of the 14th Amendment which Declares that no State shall deny to any Person within its Jurisdiction the Equal Protection of the Laws.

The legislative history of the Fourteenth Amendment shows what is intended by "the equal protection of the laws." The first chapter of that history is devoted to the Civil Rights Bill. The first section of that bill reads as follows:

"All persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens of every race and color, without regard to any previous condition of slavery or involuntary servitude, except as a punishment for crime, whereof the party shall have been duly convicted, shall have the same right, in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sue, hold, and enjoy real and personal property, *and to the full and equal benefit of all laws and proceedings for the security of person and property* as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding."

It is well known that the Civil Rights Bill was believed by many republicans, and all the democrats, to be unconstitutional.

It had been declared unconstitutional from the bench by some of the State courts. It had been bitterly opposed by the democratic party in Congress, and it was well understood that it would be repealed whenever that party should come into power. To avoid such a result the leading republicans in Congress determined to place the Civil Rights Bill, or the principle of universal equality before the law, upon which it was founded, in the Constitution, where it would be beyond the reach of a democratic majority in Congress. Consequently a joint resolution, which did not contain the definition of citizenship found in the first sentence of the first section of the Fourteenth Amendment, was introduced, and, having taken the form of that amendment, finally became a part of the Constitution.

For the purpose of enforcing this provision of the Constitution, Congress, in 1870, re-enacted, with amendments, the Civil Rights Bill. In this re-enactment it was provided:

"That all persons within the jurisdiction af the United States shall have the same right in every State and Territory in the United States to make and enforce contracts, to sue, be parties, give evidence, and to the *full* and *equal* benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, *taxes, licenses,* and *exactions of every kind,* and to none other, any law, statute, ordinance, regulation, or custom to the contrary notwithstanding. (16 U. S. Statutes at Large, sec. 16.)

Here we have a legislative construction put upon the equality clause of the Fourteenth Amendment both before

and after its adoption. That the substance and the entire substance of the Civil Rights Bill was intended to be incorporated, in general and most comprehensive terms, in the Fourteenth Amendment admits of no doubt. If, in view of these Congressional acts, there can be any doubt left, it must be dispelled when reference is made to the debates upon the reconstruction measures of which the Fourteenth Amendment was a part.

Of this amendment Mr. Stevens said:

"The first section prohibits the States from abridging the privileges and immunities of citizens of the United States, or unlawfully depriving them of life, liberty, or property, or of denying to *any* person within their jurisdiction the equal protection of the laws. I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all asserted in some form or other in our declaration or organic law. But the Constitution limits only the action of Congress, and is not a limitation on the States. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, *so far that the law which operates upon one man shall operate equally upon all.*

Cong. Globe, 1st Sess. 39th Cong., 2286.

Mr. Fink (democrat) followed Mr. Stevens, and objected to the first section because it was in substance the Civil Rights Bill, and its introduction was an admission that the Civil Rights Bill was unconstitutional.

In reply Mr. Garfield said:

"I am glad to see this first section here, which proposes to hold over every American citizen, without regard to color, the protecting shield of law. The gentleman who has just taken his seat [Mr. Fink] undertakes to show that because we propose to vote for this section we therefore acknowledge that the Civil Rights bill was unconstitutional. He was anticipated in that objection by the gentleman from Pennsylvania [Mr. Stevens]. The Civil Rights bill is now a part

of the law of the land. But every gentleman knows it will cease to be a part of the law whenever the sad moment arrives when that gentleman's party comes into power.

"*It is precisely for that reason that we propose to lift that great and good law above the reach of political strife, beyond the reach of the plots and machinations of any party, and to fix it in the serene sky, in the eternal firmament of the Constitution, where no storm of passion can shake it, and no cloud can obscure it.* For this reason, and not because I believe the Civil Rights bill unconstitutional, I am glad to see that first section here." (Ibid., 2462.)

Mr. Thayer (republican) said:

"With regard to the first section of the proposed amendment to the Constitution, it simply brings into the Constitution what is found in the bill of rights of every State of the Union; as I understand it, it is but incorporating in the Constitution of the United States the principles of the Civil Rights bill, which has lately become a law, and that not, as the gentleman from Ohio [Mr. Fink] suggested, because, in the estimation of this House, that law cannot be sustained as constitutional, but in order, as was justly said by the gentleman from Ohio who last addressed the House [Mr. Garfield], that that provision, so necessary for the equal administration of the law, so just in its operation, so necessary for the protection of the fundamental rights of citizenship, shall be forever incorporated in the Constitution of the United States." (Ibid., 2465.)

Mr. Boyer (democrat) said:

"The first section embodies the principles of the Civil Rights Bill." (Ibid., 2467.)

Mr. Rogers (democrat) said:

"This section of the joint resolution is no more or less than an attempt to embody in the Constitution of the United States that outrageous and miserable Civil Rights bill which passed both houses of Congress and was vetoed by the President." (Ibid., 2538.)

Mr. Bingham, who was the author of the resolution, said:

"The necessity for the first section of this amendment to the Constitution, Mr. Speaker, is one of the lessons that have been taught to your committee, and taught to all the people of this country, by the history of the past four years of terrific conflict—that history in which God is, and in which He teaches the profoundest lessons to men and nations. There was a want hitherto, and there remains a want now, in the Constitution of our country which the proposed amendment will supply. What is that? It is the power in the people, the whole people of the United States, by the express authority of the Constitution, to do that by Congressional enactment which hitherto they have not had the power to do, and have never even attempted to do; that is, to protect by national law the privileges and immunities of all the citizens of the Republic and the inborn rights of every person within its jurisdiction, whenever the same shall be abridged or denied by the unconstitutional acts of any State." (Ibid., 2542.)

Such judicial construction as has been given to this equality clause is consistent with this legislative construction.

In 1872 the Legislature of Maine enacted the following statute:

"No person shall recover of any city or town in this State damage for injury to person or property, which damage is claimed to have been done in consequence of any defect or want of repair, or sufficient railing, in any highway, townway, causeway, or bridge, provided the said damage be done to or claimed by any person who was, at the time said damage was done, a resident of any country where damage done under similar circumstances is not recoverable by the laws of said country." (Act 1872, c. 34.)

In the case of *Pearson* vs. *The City of Portland* (69 Maine, 278) the plaintiff sued for damages under the foregoing act. It appeared that at the time of her injury she was a resident of Cuba, and the question was whether, by reason of her non-residence in the State, she was barred from maintaining the action. The general law in force at the time of

the passage of the foregoing act provided that such actions might be maintained, and the question to be decided, therefore, was whether the act was repugnant to the Fourteenth Amendment, on the ground that it denied to non-residents, within the jurisdiction of the State, the equal protection of the laws. The court said:

"The only question we find it necessary to consider is whether this act is constitutional. We think it is not. It is in conflict with the Fourteenth Amendment of the United States Constitution, which declares, among other things, that no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' By the general statutes in force in this State at the time of the passage of this act (and still in force), every person sustaining an injury, in person or property, through any defect or want of repair in any highway, townway, causeway, or bridge, could recover for the same in an action on the case, of the town, city, or county whose duty it was to keep the way in repair. (R. S., c. 18, § 65.) This is a protective law. It guards the traveler against injuries by making the towns and cities more careful to keep their ways in repair, and shields him from loss in case he is injured through their negligence in not keeping them in repair. And it is universal in its application. It protects every one alike. The act of 1872 undertakes to destroy this equality of protection. It declares in effect that one class of persons shall not be thus protected; that if they happen to be residents of a country where no similar protection exists, they must travel in this State at their peril, and without that protection which the law affords to all others. They may be citizens of the United States and of this State, and within its jurisdiction at the time of injury. Still they are denied redress, denied 'the equal protection of the laws,' on account of the condition of the law of a foreign country, for which they may be no more responsible than they are for the color of their eyes or the color of their skins.

"The denial might as well be based on race or color as upon the law of a foreign country, for the parties to be affected by it may be as powerless to change the one as the other. The general statute may undoubtedly be repealed, but the court is of opinion that while it remains in force for

the protection of one class of persons within the jurisdiction of the State, it must remain in force for the protection of all others similarly situated."

In the case of *Ah Fong* (3 Sawyer, 157) it was said by the court:

"Discriminating the partial legislation, favoring particular persons, or against particular persons of the same class is now prohibited. Equality of privilege is the constitutional right of all citizens, and equality of protection is the constitutional right of all persons. And equality of protection implies not only equal accessibility to the courts for the prevention or redress of wrongs and the enforcement of rights, but equal exemption with others of the same class from all charges and burdens of every kind."

In *Barbier* vs. *Connolly* (113 U. S. 31) this court said:

"The Fourteenth Amendment, in declaring that no State 'shall deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws,' undoubtedly intended not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of any one except as applied to the same pursuits by others under like circumstances; that no greater burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice, no different or higher punishment should be imposed upon one than such as is prescribed to all for like offences."

To the same effect is the case of *Soon Hing* vs. *Crowley* (113 U. S. 703).

So far as I am advised, it has never been held by any court that Congress, in re-enacting the Civil Rights Bill and adding thereto the clause in relation to "taxes, licenses, and exactions of every kind," exceeded the measure of its power under the Fourteenth Amendment. On the contrary, this legislation has received the approval and sanction of this Court in *Strauder* vs. *West Virginia* (100 U. S., p. 311). Referring to this legislation, this Court said: "This act puts in the form of statute what has been substantially ordained in the constitutional amendment. It was a step toward enforcing the constitutional provision."

In the last case it was held that a statute of West Virginia, which, in effect, denied to negroes the right to serve as jurors in the administration of justice, on the sole ground of color, violated the equality cause of the Fourteenth amendment.

Tax Laws within the Equality Clause.

If so, it is not easy to perceive upon what ground a tax law which imposes upon negroes, under the same conditions, greater burdens than upon their white neighbors, can be upheld; and unless this amendment confers greater rights and privileges upon negroes than are enjoyed by white men, it is not easy to perceive why a tax law which imposes a greater burden, under the same conditions, upon one white man than it does upon another, does not equally violate this equality clause.

As has been repeatedly remarked by this and other courts, the language contained in this equality clause is the broadest and most comprehensive that could have been selected.

It is general as to persons and general as to laws—no persons are excepted from its operation and no laws.

Transpose the sentence. "All laws shall afford equal protection to all persons." Thus expressed there can be no doubt as to its meaning. The meaning of the other form of expression is the same. All persons, white and copper-colored as well as black—all laws, revenue laws as well as jury laws, are included.

The absurdity of the contention that tax laws are excepted from the operation of the Fourteenth Amendment may be forcibly illustrated by inserting in the amendment an exception to that effect, as was done by one of the counsel of defendant in the San Mateo case. The amendment would then read as follows:

"No State shall deprive any person of his property without due process of law, *except it be in the form of taxation*, nor deny to any person within its jurisdiction the equal protection of the laws, *except it be in the form of taxation.*"

Had the framers of the Fourteenth Amendment thus written it the world would have stood astounded, and it is astonishing that there are persons who contend that it must be read as if it had been so written.

A law which taxes A upon certain property and does not tax B upon the same kind or class of property, if he has it—a law which taxes A at a higher *ad valorem* rate than it taxes B upon the same kind of property—is neither equal nor uniform and does not afford to A equal protection with B. This is self-evident, and if A was a negro and B a white man such a law, without hesitation, would be declared to be within the inhibition of the equality clause.

The contention of the plaintiff that the revenue laws of the States are unaffected by the Fourteenth Amendment is

without support, either in the language used or the reason upon which it is based. On the contrary, both the language and the reason bring such laws within its operation.

The States possess no power so liable to abuse as the power of taxation. It has been the most ready and convenient means of oppression in all ages. At one time, in England, the king claimed the right to levy taxes, and great abuses and oppression were the result. His right was contested by the Commons, and, after years of struggle, the question was put to rest by the Bill of Rights. Hence, in nearly every State constitution, the exercise of the taxing power is carefully guarded and limited.

Such restraints are put upon its exercise as to secure equality and uniformity—a fair and equitable distribution of the burdens of government. It, at least, admits of debate, whether in all free republican governments the requirement of equality and uniformity in taxation is not implied in the nature and purposes for which they are organized, even where there are no express restrictions in the Constitution upon the exercise of the taxing power.

In all free republican governments the social compact is made for the mutual benefit and mutual protection of all its members. Mutual benefit and mutual protection imply equality and uniformity in the operation of laws enacted to secure those ends. Members of the social compact are supposed to agree that they shall contribute equally, according to their means, to the support of the government, and that they shall share equally in such protection to life, liberty, and property as the laws of the country may afford. The obligation of every member of the body politic is to contribute his just share, but no more, to the public burdens,

and this obligation is an indispensable feature in all governments entitled to the appellation, free. This doctrine has been most ably sustained in Kentucky, where the constitution contains no restrictions upon the exercise of the taxing power, except such as are implied in the nature of free governments and expressed in the Bill of Rights.

Speaking to this question in the case of *Lexington* vs. *McQuillan's Heirs* (9 Dana, 513), Chief Justice Robertson said:

"When shall a tax be levied? To what amount? Shall it be a capitation or property tax? Direct or indirect? *Ad valorem* or specific? And what classes of property are the fittest subjects of taxation? Are all questions wisely confided by our Constitution to the discretion of the legislative departments, subject to no other limitation than that of the moral influence of public virtue or responsibility to public opinion. But in some other respects, and so far as the power of taxation may be effectual being thus limited, it is in our opinion limited by some of the declared ends and principles of the fundamental laws. Among these political ends and principles, equality, as far as practicable, and security of property against irresponsible power, are eminently conspicuous in our State constitution. An exact equalization of the burdens of taxation is unattainable and Utopian, but still there are well-defined limits within which the practical equality of the Constitution may be preserved, and which, therefore, should be deemed impassable barriers to legislative power. Taxation may not be universal, but it must be general and uniform; hence, if a capitation tax be laid, none of the class of persons thus taxed can be constitutionally exempt upon any other ground than that of public service; and if a tax be laid on land, no land within the limits of the State can be constitutionally exempted, unless the owner be entitled to such immunity on the ground of public service. The Legislature, in the plentitude of the taxing power, *cannot* have constitutional authority to exact from one citizen, or even from one county, the entire revenue for the whole Commonwealth. Such an exaction, by whatever name the Legislature might choose to call it, would not be a tax, but would be undoubtedly the taking of private property for public use, and which could not be

done constitutionally without the consent of the owner or owners, or without retribution of the value in money.

"The distinction between constitutional taxation and the taking of private property for public use by legislative will may not be definable with perfect precision, but we are clearly of the opinion *that whenever the property of a citizen shall be taken from him by the sovereign will, and appropriated without his consent to the benefit of the public, the exaction should not be considered as a tax, unless similar contributions be made by that public itself, or shall be exacted rather by the same public will, from such constituent members of the same community generally as own the same kind of property.*

"Taxation and representation go together, and representative responsibility is one of the chief conservative principles in our form of government. When taxes are levied, therefore, they must be imposed on the public in whose name and for whose benefit they are required, and to whom those who impose them are responsible; and although there may be a discrimination in the subjects of taxation, still persons in the same class, and property of the same kind, must generally be subjected alike to the same common burden. This alone is taxation, according to our notion of constitutional taxation in Kentucky, and this idea, fortified by the spirit of our Constitution, is, in our judgment, confirmed by so much of the twelfth section of the tenth article as declares, '*nor shall any man's property be taken or applied to public use without the consent of his representatives, and without just compensation being previously made to him.*' "

All writers on political economy agree that the taxing power should be exercised so as to secure equality of burden.

Upon this subject Mr. Smith, the author of the "Wealth of Nations," remarks:

"The subjects of every State ought to contribute to the support of the Government as nearly as possible in proportion to their respective abilities; that is, in proportion to the revenue which they respectively enjoy under the protection of the State. The expense of government to the individuals of a great nation is like the expense of management to the joint tenants of a great estate, who are all obliged to contribute in proportion to their respective interests in the

estate. In the observation or neglect of this maxim consists what is called the equality or inequality of taxation."

The injustice of unequal taxation is most clearly and forcibly stated by Mr. Justice Christiancy in the case of *Woodbridge* vs. *The City of Detroit* (8 Mich., 301). He said:

"To compel individuals to contribute money or property to the use of the public without reference to any common ratio, and without requiring the sum paid by one piece or kind of property or by one person to bear any relation whatever to that paid by another, is, it seems to me, to levy a forced contribution, not a tax, duty, or impost within the sense of these terms as applied to the exercise of powers by any enlightened or responsible government."

Upon this head Judge Cooley observes:

"But every one has a right to demand that he be governed by general rules, and that a special statute that singles his case out as one to be regulated by a different law from that which is applied in all similar cases would not be legitimate legislation, but an arbitrary mandate, unrecognized in free government."

Cooley's Con. Lim., p, 392–3.

And in note at p. 393 the author cites *Wally's Heirs* v. *Kennedy* (2 Yerg., 554), wherein the Court said:

"The rights of every individual must stand or fall by the same rule or law that governs every member of the body politic, or land, *under similar circumstances*, and every partial or private law which directly proposes to destroy or affect individual rights, or does the same thing by affording remedies leading to similar consequences, is unconstitutional and void. Were it otherwise odious, individuals and corporations would be governed by one law; the mass of the community and those who made the law by another, whereas the like general law affecting the whole community equally could not have been passed."

The American people are unaccustomed to unequal, and therefore unjust, taxation. The doctrine that taxation should

be equal and uniform has become so firmly embedded in the fundamental laws of their country, in its statutes and judicial decisions, that to them the word "taxation," *ex vi termini*, imports equality and uniformity. From the commencement they have been taught that "all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, and the pursuit of happiness; and that to secure these rights governments are instituted among men." In keeping with such teachings, the idea that any department of the government has power, under any pretext or by any means, to destroy that equality or disturb them in the enjoyment of any of those rights is to them abhorrent.

No better example of this can be found than that furnished by the people of the State of California in recently changing their constitution. Under the old constitution the supreme court of that State, under the influence of some strange aberration of the judicial mind, held that mortgages, or debts secured by mortgages, were not taxable, although before that time the contrary had been the settled rule and practice. This decision was one of the causes which led to the adoption of the new constitution. Under that decision the capitalists and money lenders escaped taxation, and the owners of land and other tangible property were made to contribute more than their just share to the support of the government.

Hence the new constitution provides, except in the case of *quasi* public corporations, that a debt secured by mortgage shall be considered, for the purposes of taxation, as an interest in the land, and taxed as such to the mortgagee. The mortgagor and mortgagee are, in the matter of taxes,

converted into tenants in common, and each made to pay the taxes upon his interest in the land.

The foregoing views are fully sustained by some of the ablest and most intelligent judges and jurists this country has produced. In addition to the citations already made upon this question I refer this Court to the following.

Mr. Justice Miller, delivering the opinion of the Court, in the case of the *Loan Association* vs. *Topeka* (20 Wallace, 662), says:

"It must be conceded that there are rights in every free government beyond the control of the State. A government which recognized no such rights, which held the lives, the liberty, and property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is, after all, but a despotism. It is true a despotism of the many—of the majority, if you choose to call it so; but it is none the less a despotism. It may well be doubted if any man is to hold all that he is accustomed to call his own, all in which he has placed his happiness, and the security of which is essential to that happiness, under the unlimited dominion of others, whether it is not wiser that this power should be exercised by one man than by many."

And again (*Id.*, p. 663):

"There are limitations on such power which grow out of the essential nature of all free governments—implied reservations of individual rights, without which the social compact could not exist, and which are respected by all governments entitled to the name."

In the case of *Washington Avenue* (69 Penn. St. R., 362), Agnew, J., delivering the opinion of the Court, says:

"There is no case in our books wherein the legislative power to tax has been maintained with greater vigor and ability than *Sharpless* vs. *The City of Philadelphia* (9 Harris); yet even there the Chief Justice admits (p. 166) that the exercise of the power may be forbidden by clear implication

as well as express restriction. 'It is not every act the Legislature may choose to call a tax law that is constitutional.' 'The whole public burden,' he contends, 'cannot be thrown upon a single individual, under pretence of taxing him.' This is a concession that taxation has a limit, *per se*, and is not always coextensive with legislative exaction. When, therefore, the Constitution declares, in the ninth article, that among the inherent and indefeasible rights of men is that of acquiring, possessing, and protecting property—that the people shall be secure in their possessions from unreasonable seizures—that no one can be deprived of his property unless by the judgment of his peers or the law of the land; that no man's property shall be taken or applied to public use without just compensation being made; that every man, for an injury to his lands or goods, shall have remedy by due course of law, and right and justice administered without sale, denial, or delay; and that no law impairing contracts shall be made; and when the people, to guard against transgressions of the higher power delegated by them declared that these rights are excepted out of the general powers of government, and shall forever remain inviolate, they, for their own safety, stamped upon the right of private property an inviolability which cannot be frittered away by verbal criticism on each separate clause.

"There is a clear implication from the primary declaration of the inherent and indefeasible right of property, followed by the clauses guarding it against specific transgressions, that covers it with an ægis of protection against all unjust, unreasonable, and palpably unequal exactions under any name or pretext. Nor is this sanctity incompatible with the taxing power or that of eminent domain, where, for the good of the whole people, burdens may be imposed or property taken.

"I admit that where the power to tax is unbounded by any express limit in the Constitution that it may be exercised to the full extent of the public exigency. I concede that it differs from the power of eminent domain, and has no thought of compensation by way of a return for that which it takes and applies to the public good further than all derive benefit from the purpose to which it is applied. But, nevertheless, taxation *is* bounded in its exercise by its *own nature, essential characteristics, and purpose.* It must, therefore, visit all alike in a reasonably practicable way of

which the Legislature may judge, but within the just limits of what is taxation. Like the rain, it may fall upon the people in districts and by turns, but still it must be public in its purpose, and reasonably just and equal in its distribution, and cannot sacrifice individual right by a palpably unjust exaction. To do so is *confiscation, not taxation; extortion, not assessment;* and falls within the clearly implied restriction in the Bill of Rights."

In *People* vs. *Mayor of Brooklyn* (6 Barb., 214), the Court says:

"Untrammeled by authorities, a safe and sound rule may be deduced from a few simple and well-settled principles. In the first place, it may be assumed as a fundamental principle in our Government and laws that individuals are protected in the enjoyment of their property, except so far as it may be taken in two ways, viz: As a public tax, *upon principles of just equality,* or for public use, with a just compensation, ascertained according to the provisions of the Constitution; secondly, as money is property, every tax or assessment is taking money in some mode, and to be legal must refer to one of the modes above mentioned. Taxes are defined to be 'burdens or charges imposed upon persons or property to raise money for a public purpose.' The right to impose a tax is inherent in every government. * * * We are not to, however, understand that the Legislature is omnipotent on this subject. Its powers are limited and controlled by certain principles which lie at the very foundation of free government. *Among these is the principle of just equality.* * * * This is the only sense in which a tax is public. The Legislature has not the constitutional authority to exact from a single citizen, or a single town, or county or city, the means of defraying the entire expenses of the State; for if this could be done, the constitutional prohibition would be evaded in all cases, and the Legislature could take private property for public use without compensation to any extent, under the vague and indefinite pretence of taxation."

Again, at page 216, the court says:

"The true rule deducible from sound reasoning, as well as the authorities, is this: Legitimate taxation is limited to the

imposing of burdens or charges for a public purpose, equally upon the persons or property within a district known and recognized by law."

The case above referred to is cited approvingly in *People* vs. *Lynch* (51 Cal., 20).

In *Wilkerson* vs. *Leland* (2 Peters, 627), Mr. Justice Story held this language:

"The fundamental maxims of free government seem to require that the rights of personal liberty and private property should be held sacred."

In view of the foregoing citations, it may be safely asserted that taxes that are not levied and apportioned with reference to some common ratio or rule which will secure equality and uniformity are not sanctioned by the principles which underlie American institutions.

Arbitrary and unequal taxes and exactions in whatever form can find no fitting place in the laws of an intelligent people, who boast of their freedom, and who have made equality before the law the corner-stone of the social fabric.

These principles of American law were well known to the statesmen who framed the Fourteenth Amendment, and if that provision is to be read as applying to all State laws, as I have endeavored to show, it inhibits the States from imposing upon any person or persons within their jurisdiction unequal taxes, burdens, and exactions of every kind. While there has been, so far as I am advised, no case in which it has been expressly held that tax laws are within the scope of the Fourteenth Amendment, there have been several where it was assumed such was the case—*State Railroad Tax Cases* (92 U. S., 575); *Davidson* vs. *New Orleans* (96 U. S. R., 97); *Hagar* vs. *Reclamation District No.* 108 (111 U. S., 701); *Kelly*

vs. *Pittsburgh* (104 U. S. R., 78), and *The Kentucky Railroad Tax Cases* (present term).

In *Kelley* vs. *Pittsburgh* the question was whether the tax law in that case deprived the plaintiff of his property without due process of law. Speaking to that question, the court said:

"As regards the effect of the Fifth amendment of the Constitution, it has always been held to be a restriction upon the powers of the Federal Government, and to have no reference to the exercises of such powers by the State governments. We need, therefore, give the first assignment no further consideration. But this is not material, as the provision of section 1, Article XIV, of the amendments *relied* on in the second assignment contains a prohibition on the power of the States in language almost identical with that of the Fifth amendment. That language is that 'no State shall * * * deprive any person of life, liberty, or property without due process of law.'"

The court then proceeded to discuss the tax law for the purpose of determining whether it was in conflict with the Fourteenth Amendment. It did not occur to counsel or the court that State tax laws were not within the operation of that amendment. So of the other cases cited.

The Constitution and Statutes of California Impose Unequal Taxes.

Having shown that State laws in respect to taxation are within the scope of the Equality Clause of the Fourteenth Amendment, it remains to be seen whether the scheme of taxation which exists in California is in fact unequal in its operation, either as to its methods or effects.

The discriminations made by the constitution and laws of California to the prejudice of the defendant and others similarly situated are as follows:

1st. In the assessment of property belonging to natural persons and private corporations—not *quasi* public—mortgages are deducted, but in the assesment of property—of whatever kind or description—of railroad and other *quasi* public corporations, mortgages are not deducted.

2nd. The property of railroad and other *quasi* public corporations, *operated in one county only*, is assessed by the county assessor, and such corporation is entitled to appeal to the county Board of Equalization and to notice and an opportunity to be heard; but in the case of property of railroad and other *quasi* public corporations, *operated in more than one county*, the right to appeal to a board of equalization and an opportunity to be heard at any stage of the proceedings are denied.

3d. Railroad property owned and operated by a natural person, whether operated in one county or more, is assessed the same as other property belonging to natural persons—that is to say, mortgages are deducted; but if such property belongs to a corporation instead of a natural person, mortgages are not deducted.

The record in this case shows that there are railroads in California *owned* and *operated* by *natural persons;* and that it has been a common practice on the part of the Legislature of that State to grant railroad franchises and privileges to natural persons. In the assessment of all such railroads, mortgages are deducted. The constitution of that State denies such deduction only in the case of railroads *owned by corporations.* (Findings XXIX, XXX, Con., art. XIII, sec. 4, *ante*, p. 17.)

1st. It should be borne in mind that the defendant, as

appears by the record, is the corporation mentioned in the eighteenth section of the act of Congress in relation to the Atlantic and Pacific Railroad Company (14 U. S. Stat. at Large, 292), and the twenty-third section of the act of Congress in relation to the Texas Pacific Railroad Company (16 U. S. Stat. at Large, 573), and that its railroad is some seven hundred miles in length. (Findings IV to XI, inclusive.)

By the third section of the former of said acts there was granted to said defendant every alternate section of public land, not mineral, designated by odd numbers, to the amount of ten alternate sections per mile on each side of its road, making in all several million acres of land. These lands the defendant owns and holds in all respects the same as lands are owned and held by natural persons. It has mortgaged its road, with its rolling-stock and other property, and these lands, to secure the payment of its bonds, to the amount of more than $30,000,000. This mortgage was unpaid at the time the assessment was made. By the laws of California—constitution and statutes—the property of railroad and other *quasi* public corporations operating in more than one county, so far as it consists of franchises, roadways, road-beds, rails, and rolling-stock, is assessed by the State Board of Equalization and apportioned to the several counties, &c, through which the road runs in proportion to the number of miles in such counties, while all of their other property, including lands which they may own, the same as natural persons, is assessed by the assessors, &c., of the several counties, districts, &c., in which it is situated. (Con., art. XIII, sec. 10.)

In respect to the assessment and taxation of lands and other property of railroad and other *quasi* public corpora-

tions, such mortgage, deed of trust, contract, or other obligation, if there be any, is entirely ignored—that is to say, it is not deemed or treated as an interest in the property affected thereby. (Con., art. XIII, sec. 4.) In the case of natural persons and corporations not *quasi* public, the value of such mortgage, &c., is assessed and taxed as an interest in the land which belongs to the mortgagee, and the difference between the value of the mortgage and the value of the land unincumbered is assessed and taxed as an interest in the land which belongs to the mortgagor.

Thus a tenancy in common is created between mortgagor and mortgagee, and each is required to pay the taxes upon his interest in the land. This is also true in respect to other property. If, therefore, A owns property of the value of ten thousand dollars, and mortgages it for five thousand dollars to B, each owns, for the purposes of taxation, an undivided half interest in the property upon which he is required to pay the taxes.

By this method, which is fair and equitable, the *commercial* value only of A's property is taxed against him. It seems to have been the design of the framers of the Constitution to tax natural persons and corporations, not *quasi* public, in proportion to what they are worth, in a commercial sense. But this fair and equitable rule is not not made the measure of valuation in the case of railroad and other *quasi public* corporations. They are required to pay taxes not upon the commercial value of their property in case it is under mortgage, but upon what would be its commercial value if it were unencumbered; which, in legal effect, is requiring them to pay taxes upon property which does not belong to them, but to their mortagees. Suppose such a corporation, like A

in the above illustration, owns property of the value of ten thousand dollars, and also mortgages it to B for five thousand dollars, it then, like A, has only an interest in the property worth five thousand dollars; and B, as in the case of A, has the remaining interest worth the same sum. So the conditions are, in all legal aspects, the same in both cases. The only difference between them lies in the fact that in the former case the mortgagor is a natural person or a corporation, not *quasi* public, while in the latter the mortgagor is a *quasi* public corporation.

It is manifest that under such conditions the burden imposed upon A and the burden imposed upon the corporation are not equal; on the contrary, the latter is double the former.

Again: By "other *quasi* public corporations" are to be understood all such corporations as are engaged in business for the benefit and accommodation of the public, as well as themselves—that is to say, business affected by a public use. Included in this class are all corporations engaged in the business of common carriers by water, such as steamship companies and companies owning other kinds of water craft, all corporations engaged in the business of innkeepers and all corporations owning elevators and engaged in the business in which such elevators are used; also, all corporations engaged in the telegraph business, or in the business of furnishing water to cities and towns. There may be other corporations than those mentioned which are *quasi* public. Under the taxing scheme in question each of these corporations is denied a right which is accorded to corporations not *quasi* public and to natural persons owning the *same kind of property and carrying on the same kind of business.*

If the property of the latter be incumbered they are allowed the privilege or right to have the value of such incumbrance deducted from the value of their property, when it comes to be valued or assessed for the purposes of taxation, while such is not the case with the former. If A, B, and C, in their capacities as natural persons, own a line of steamers, or a hotel, or an elevator which is employed by them in the *quasi* public business for which such properties are used, and there is a mortgage upon their property, they may lawfully, under the taxing scheme in question, claim, when the assessor comes around, that such mortgage be deducted in the valuation of their property. If they own an elevator worth a hundred thousand dollars and it is mortgaged for fifty thousand dollars they are taxed upon the latter sum only.

If, in order to secure such advantages, in the transaction of their business, as are afforded by the law to artificial persons over natural persons, they form a corporation, as was done by Merrill, Holbrook, Stetson and Hurd, as above stated, and own the same property, with the same mortgage upon it, and continue the same *quasi* public business, they are denied the right, when the assessor comes around, to claim a deduction of fifty thousand dollars from the value of their property, on account of the mortgage, and are taxed upon one hundred thousand dollars. In other words, in their corporate capacity they are required to pay double the amount of taxes which they had to pay as natural persons.

In their former capacity they are required to pay taxes upon property which does not, in a commercial sense, and in the meaning of the taxing system in question, belong to them, while in the latter capacity they are only required to

pay taxes upon what they are actually worth in a commercial sense.

2d. Such is one of the unjust discriminations which, under the taxing system in question, result in unequal taxation. There is still another equally vicious. The discrimination already considered is between all *quasi* public corporations, on the one side, and all corporations not *quasi* public and natural persons on the other side. The discrimination about to be considered is between railroad corporations which operate railroads of which the termini are in different counties, on the one hand, and railroad companies which operate railroads of which the termini are in the same county, and all other corporations *quasi* public and not *quasi* public, and natural persons, on the other hand. This latter discrimination results from the different methods and proceedings which are provided for the purpose of ascertaining and finally determining the value of property for the purposes of taxation, as between these two classes of tax-payers. All the property of the latter class is assessed by local assessors. (Cons. art. XIII, sec. 10.) The property of the former class, so far as it consists of strictly railroad property, excepting stations, depots, &c., is assessed by the State Board of Equalization. (Cons. art. XIII, sec. 10.)

The local assessors are required to complete their assessment books on or before the first Monday in July in each year. (Pol. Code, § 3652.)

As soon as completed, the assessment book must be deposited with the clerk of the board of supervisors, who must immediately give notice thereof, and of the time at which such board will meet as a board of equalization, by publication in a newspaper, if one be published in his county,

and if not, then in such manner as the board may direct; and in the meantime the assessment book must remain in his office open to public inspection. (Pol. Code, § 3654.) The board must meet on the first Monday in July—not *on or before*—to examine the assessment book and equalize assessments. (Pol. Code, § 3672.) Upon *notice*, given in such manner as they may by rule prescribe, the board may increase or lower the entire assessment-roll, or any assessment contained therein. (Pol. Code, 3673.)

Thus it appears that all tax-payers in the State, except corporations which own and operate railroads which have their termini in different counties, are informed by the *law*, of which they are bound to take notice, as to the precise day when the assessment book will be completed and delivered to the clerk of the board of supervisors, and that from that time it will be open to their inspection. They are afforded ample time to inspect the assessment of their own property and the assessments of the property of their neighbors for the purpose of determining whether they are fair, equal, and just.

They are also informed by *law* as to the precise day on which the board of supervisors will meet as a board of equalization, and they are also informed by notices published in the newspapers, so that if they desire they can attend the meeting and be heard as to their own and as to the assessments of their neighbors.

Ample notice and ample opportunity is afforded them by the law to enable them to be heard by witnesses and by counsel, or in person, in respect to the fairness of their assessments. To them the right is accorded to appeal from the decision of the assessor to the board of equalization.

If any of their property has been omitted from the assessment book, it cannot be added to their assessments except upon ten days' notice by letter, post paid, deposited in the post office or express office to their address. (Pol. Code, § 3681.)

In respect to them, therefore, the utmost care is taken as to notice and the right to an equalization of their assessments. As to them *due process of law* is fully provided. Such is not the case in respect to corporations operating railroads in more than one county, so far as their franchises, roadways, road-beds, rails, and rolling-stock are concerned. In respect to their other property, such as work-shops, repair-shops, car-shops, and round-houses, stations, depots, buildings, gravel-beds, and lands not included within their right of way, they are afforded the same notice of the proceedings and the same right to appeal and to equalization as other tax-payers.

In what I am about to say in respect to the mode of assessing railroads, &c., operated in more than one county, I shall first assume that that portion of section 3664 of the Political Code which is included in brackets is not law (*ante*, page 11). I shall then assume that it is law.

In respect to the assessment of railroads, &c., the law provides that some officer of the corporation, to be designated by the State Board of Equalization, shall, on or before the first Monday in April, furnish the board a sworn statement containing a list of such property as the board is required to assess, and showing such other facts as the board may require to enable it to form some idea of the value of the property contained in the list. *On or before* the first Monday in May, not on a day certain (as was the case in the *State Railroad*

Tax Cases [92 U. S., 575] and the *Kentucky Railroad Tax Cases* recently decided), but at any time they may see fit between these two dates, and without any notice by personal citation or otherwise, they may assess the property. *On or before* the fifteenth day of May, and not on a day certain, they are required to transmit the assessment and their apportionment to the several counties to the county assessors. This they may do upon the very day the assessment is made, and thus no time may be allowed for inspection by the parties interested. The statement containing their assessment and apportionment is then entered on the assessment books of the several counties. Upon such assessment and apportionment the corporation pays the same percentage as is charged against other tax-payers. Such are all the provisions of the law upon the subject, excepting the matter contained in section 3664 of the Political Code, inclosed in brackets, and Section 9, Article XIII, of the Constitution, which last section does not, as held by the Supreme Court of the State (*San Francisco and North Pacific Railroad Company* vs. *State Board of Equalization*, 60 Cal., 12), confer any power upon the State board to equalize railroad assessments made by them, and although they are required to meet, on the third Monday in August, as a board of equalization, they cannot at such meeting, or at any other time, equalize railroad assessments which have been made by them, however unequal they may appear to be when compared with the assessments of similar property made by local assessors and equalized by local boards of equalization. The county boards have no power to equalize the assessments made by the State board. (*People* vs. *Supervisors, &c.*, 59 Cal., 321.)

So it appears that such corporations are denied the right

to notice of the proceedings from commencement to end; are denied an opportunity to be heard at every stage of the proceedings, and finally are denied all right to an appeal and to an equalization of their assessments by another tribunal, or even by the tribunal which has assessed their property, all of which rights are secured to all other tax-payers in the most ample manner.

A system of laws which thus affords notice and an opportunity to be heard to one class of tax-payers, and denies an opportunity to be heard by another class of tax-payers, must be repugnant to the equality clause of the Fourteenth Amendment, *and that, too, whether such notice and opportunity be an indispensable factor in due process of law or not.* Suppose the law provided for such notice or opportunity in the case of white men, and denied such notice or opportunity in the case of black men, would it be pretended by any one that such a law affords the same protection to the latter that it does to the former? Suppose a law should be enacted giving the right to appeal from an inferior court to a superior court in a given case to white men, but should deny such right in the same case to black men, would such a law afford equal protection to white and black? That it would not is too obvious for argument, and yet these illustrations differ from the case under discussion in circumstance only, not in principle.

3d. As already stated, as the record shows (Findings XXVII, XXIX, XXX), it has been the custom in California to grant railroad franchises and privileges to natural persons, and there are, in that State, railroads owned and operated by natural persons. Under this taxing system these railroads are assessed the same as other property belonging to natural

persons. If there be mortgages upon them they are deducted in ascertaining the value of the taxable interest of the owners of such railroads, while in the case of railroads owned by corporations no such deductions are allowed. Here a discrimination is made, not between different kinds of property, on the ground of use or otherwise, but between the same kinds of property *affected by the same use* solely upon the ground that in one case the property belongs to a natural person and in the other to a corporation. If such a discrimnation be not repugnant to the equality clause of the Fourteenth Amendment, then that clause is meaningless and its authors builded less wisely than they knew.

Next, conceding, for the sake of the argument, that the latter portion of section 3664 inclosed in brackets is law, what further rights does it confer upon corporations of the kind in question, and does it supply any of the fatal omissions found in the former part?

It provides that any person who is dissatisfied with any assessment made by the State board may, within five days after such assessment has been entered in the records of the board, apply by petition in writing to have the assessment corrected in any particular. Upon the filing of such petition the board is required to fix a time for hearing, which shall be not less than five nor more than ten days from the time the petition is filed. The further proceedings which may be had are not material to the present purpose. Here there is a seeming opportunity to be heard, but it is an opportunity in seeming only. The objection to this proceeding—and it is a fatal one—is that it wholly fails to provide for any notice to the party interested.

For reasons already given he has no notice of the time

when the assessment is to be made, and not being notified as to when it is entered of record he is wholly without any information as to when he must file his petition.

Besides, even if he had notice at once upon the entry of the assessment, the time allowed him—five days—to go hundreds of miles, it may be to the capital to examine the assessment and prepare his petition is altogether too short to be of any avail. Some of the corporations in question have their principal places of business more than five hundred miles from the capital.

It must be borne in mind that in geographical extent California is only a trifle less than New England, New York, and Pennsylvania combined.

So if it be held that the portion of section 3664 which is inclosed in brackets is law, the result is the same, and the case of the plaintiff in error is in nowise made stronger. The fatal omissions to provide notice and to afford an opportunity to be heard at some stage of the proceedings are still wanting.

These differences, both in respect to the final results and in respect to the methods by which such results are reached are fatal to equality. They are not confined to minor or unimportant parts; they affect the vitals of the system and destroy all semblance of equality and uniformity.

To repeat. The differences in methods are these: In relation to persons, other than railroad corporations operating roads in more than one county, notice is given, an opportunity to be heard is given, and a right to an equalization is secured.

In respect to corporations operating railroads in more than one county all of said rights and privileges are denied.

The differences in respect to burdens are these: In respect to corporations not *quasi* public and natural persons the law, as near as practicable, establishes the actual value of their property, in a commercial sense, as the basis of valuation—that is to say, in ascertaining the value of their property all incumbrances are deducted. In respect to *quasi* public corporations the law makes all their property, without any deduction on account of incumbrances, the basis of valuation.

This inequality is not confined to mortgagors, it touches mortgagees also. If A loans his money to a natural person and takes a mortgage he must pay taxes on the mortgaged property in proportion to the value of his mortgage. If B loans money to a *quasi* public corporation and takes a mortgage he is not required to pay taxes on the mortgaged property according to the value of his mortgage. If he be taxed upon the loan as a solvent credit the result is double taxation, both he and his debtor being taxed upon the same value, or, which amounts to the same thing, the representative of the same value, a result which this taxing system was intended to prevent in respect to everybody except *quasi* public corporations.

At page 129 of his work on taxation, Judge Cooley uses these words:

"To tax all loans of money would be equal, and would enable all to adjust their rates of interest accordingly; but to tax all except those made by A, B, and C, or all but those of the inhabitants of a single city, would be unequal, and would create an invidious and unjust distinction in favor of the excepted persons, which would give them the advantage of higher net rates. The one would be taxation, the other would be *lawless exaction*. This as a general principle is undoubted."

The inequality in the present case is quite as apparent

as in the case supposed by Judge Cooley. *Quasi* public corporations are not taxed by the same rule by which corporations not *quasi* public and natural persons are taxed. As was said in the case of the *Exchange Bank, &c.*, vs. *Hines*, (3 Ohio St. R., p. 1), "Taxing is required to be by a uniform rule—that is by one and the same unvarying standard. Taxing by a uniform rule requires uniformity not only in the *rate* of taxation, but also uniformity in the *mode* of assessment upon the taxable valuation. Uniformity in taxing implies equality in the burden of taxation. But this is not all. * * * It must extend to *all property subject* to taxation, so that all property may be taxed alike—equally—which is taxing by a uniform rule." (See also *Gilman* vs. *City of Sheboygan*, 2 Black, 517.)

Such being the equality which State constitutions and laws exact in the exercise of the taxing power, it follows that such equality is also exacted by the equality clause of the Fourteenth Amendment, if tax laws are included within its scope and operation.

This System not a Classification of Property for the Purposes of Taxation.

The contention on the part of the plaintiff in error that the discrimination made in the matter of deducting mortgages can be sustained upon the ground that the State has power to select certain kinds of property for the purposes of taxation and exempt other kinds is untenable. Neither the constitution nor laws of California classify property for the purposes of taxation or exempt any property from taxation except growing crops and credits in certain cases. The constitution declares that all *private* property shall be

taxed in proportion to its value except as above stated. (Const., Art. XIII, sec. 1.) There is, therefore, in this case, no discrimination between *kinds* of property for the purposes of taxation; the discrimination is between the *owners* of the same kind of taxable property. The former is permissible, the latter is prohibited. Independent of such restraints as may be found in its own constitution, it is not denied by me that the State, within reasonable limits, may select such property as it sees fit for taxation, and may exempt all the remainder. But having selected the property, it must tax it all alike and by uniform methods. It cannot tax A upon his property and not tax B upon his property of the same kind. If land is selected for taxation it cannot tax the land of A and not the land of B. If cows are selected, it cannot tax the cows of A and not the cows of B. Nor can it tax the land or cows of A at a higher rate of percentage on value than it taxes B's land or cows. Nor can it adopt a method, or standard, or ratio, or rule, for fixing a value upon A's land or cows which is not also applied to B's land or cows if thereby inequality is produced.

If, therefore, for the purpose of fixing the value of A's land or cows, mortgages thereon are deducted, the same rule must be observed in fixing the value of B's land or cows.

As already stated and shown, California taxes all real estate and personal property—that which belongs to *quasi* public corporations, as well as that which belongs to corporations not *quasi* public and natural persons, and *vice versa*. The property involved in this case is real estate, and all real estate is taxable. The discrimination, as already stated, is not between different *kinds of property*, by which one kind is taxed and another exempted, but between different *persons*

owning the same kind of taxable property, by which, under precisely the same conditions, one person is taxed more than another.

It is idle to talk about classification under conditions such as exist in the taxing system in question. In considering this question it must not be forgotton that the taxing system of California does not discriminate against *railroads* or other property *affected by a public use.* The discrimination is against the *property*—of whatsoever kind it may be, railroads, or lands, or buildings in country or city—of railroad and other *quasi* public corporations.

This case, for the express purpose of meeting this contention of classification and clearly exposing its fallacy, has been made to show that the defendant, in addition to its railroad, owns large bodies of agricultural and grazing lands, consisting of odd-numbered sections of the same quality and value as the adjoining even-numbered sections owned by natural persons or corporations not *quasi* public, and also that there are railroads in California which are owned and operated by natural persons, against which no discrimination is made under the taxing system of that State.

In ascertaining the value of the taxable interest of the owner of an even-numbered section of these lands mortgages are deducted, but in ascertaining the value of the taxable interest of the defendant in the adjoining odd-numbered section no such deduction is allowed; yet both sections belong to the same class or kind of property, and are held and occupied for the same purposes—are put to the same use. If one of these odd sections be sold to a natural person it becomes, in his hands, immediately emancipated from the discrimination existing against it while in the hands of the defendant.

In ascertaining the value of the taxable interest of a natural person in a railroad owned by him mortgages are deducted, but in ascertaining the value of the taxable interest of a corporation in a railroad owned by it no such deduction is allowed; yet both roads are owned and operated for the same purposes, and both are affected by the same public use. They belong to the same kind or class of property.

If the latter road be sold, under foreclosure or otherwise, and be purchased by a natural person, it is at once freed from the discrimination to which it was previously subjected. If the former road be sold or transferred to a corporation it at once becomes subject to a discrimination by which it was previously unaffected.

In view of these conditions, I repeat that the discrimination complained of cannot be held to be a classification of property for the purposes of taxation. It is, as it was intended to be, a classification of the owners of the same kind of property for the purposes of taxation, by which one class of tax-payers is subjected to more oppressive and onerous burdens than all other classes. If the former classification be allowable it is certain that the latter is not.

Upon this question of equality the decisions of this Court in relation to taxation by the States of shares in national banking associations are not only instructive, but conclusive. In the case of the *People* vs. *Weaver* (100 U. S. Rep., 539) this Court held that the provisions in section 5219 of the Revised Statutes of the United States, that State taxation on the shares of any national banking association shall not be at a greater rate than is assessed on other moneyed capital in the hands of individual citizens of the State, has

reference to the *entire process* of assessment, and includes the *valuation* of the shares, as well as the rate of percentage charged thereon. It was further held in that case that therefore the statute of a State which establishes a mode of assessment by which such shares are valued higher in proportion to their *real* value than other moneyed capital is in conflict with that section, although no greater percentage is levied on such valuation than on that of other moneyed capital; and accordingly it was further held that a statute of New York which permits a party to deduct his just debts from the valuation of all his personal property, except so much thereof as consists of such shares, taxes them at a greater rate than other moneyed capital, and is, therefore, void as to them.

In the course of his opinion in that case Mr. Justice Miller said:

"It cannot be disputed—it is not disputed here—nor is it denied in the opinion of the State court, that the effect of the State law is to permit a citizen of New York, who has money capital invested otherwise than in banks, to deduct from that capital the sum of all his debts, leaving the remainder alone subject to taxation, while he whose money is invested in shares of bank stocks can make no such deduction. Nor, inasmuch as nearly all the banks in that State and in all others are national banks, can it be denied that the owner of such shares who owes debts is subjected to a heavier tax on account of those shares than the owner of moneyed capital otherwise invested, who also is in debt, because the latter can diminish the amount of his tax by the amount of his indebtedness, while the former cannot.

"That this works a discrimination against the national bank shares as subjects of taxation, unfavorable to the owners of such shares, is also free from doubt. The question we are called to decide is, whether Congress, in passing the act which subjected these shares to taxation by the State, intended, by the very clause which was designed to prevent

discrimination between national bank shares and other moneyed capital, to authorize such a result."

Apply this logic to this case and the fit is perfect. A natural person invests his money in land and incumbers it. By the laws of California he is allowed to deduct the value of the incumbrance from the value of his land and is only required to pay taxes on the remainder.

A *quasi* public corporation invests its money in real estate also, and incumbers it, but is denied the right, which is given to the natural person, to deduct the incumbrance from the value of its land and is made to pay taxes upon the full value thereof. They each pay the same rate of percentage on such valuations, but the mode of assessment, or of fixing the valuation adopted, causes the land of the latter to be valued higher in proportion to its real value than the land of the former, and, therefore, such mode is unequal and vicious and manifestly repugnant to any rule which requires property to be taxed in proportion to its actual value. The two cases cannot be distinguished.

The rule in the case cited has been since reaffirmed in the the following cases:

Supervisors vs. *Stanley*, 105 U. S., 305.
Hills vs. *Exchange Bank*, 105 U. S., 319.
Evansville Bank vs. *Britton*, 105 U. S., 322.

In the case of the *People* vs. *Whyler* (41 Cal., 335) it was said:

"A tax is equal and uniform which reaches and bears with the like burden upon all the property within the given district, county, etc. It bears the like burden when the *valuation of each parcel is ascertained in the same mode*—the mode precribed by law—and when it is subject to the same rate of taxation as other property within the district, county, etc."

The converse of the proposition must be equally true.

See also—

Board, &c., vs. *C. B. & Q. R. Co.*, 44 Ill., 230.

Chicago & N. W. R. Co. vs. *Board, &c.*, 44 Ill., 240.

State ex rel, Trustees, &c., vs. *Township, &c.*, 36 N. J. Law, 66.

But what do counsel mean by "classification." It is a word of very indefinite and vague signification. There may be various kinds of classification. Some of them may be legal and some of them illegal. Some of them may be consistent with the Fourteenth Amendment, and some of them inconsistent. The latter certainly cannot be called classifications; they may be more properly designated illegal discriminations. If by classification is meant the selection of certain kinds of property for the purposes of taxation, and exempting all other kinds of property from taxation, such a classification may be legal; such a classification, to a limited extent, is made in the constitution and laws of California. With such a classification we do not quarrel. But if by classification we are to understand the selection of certain kinds of property for the purpose of taxation, in respect to which a mode or method of ascertaining the true value of the property differs from the mode and method employed in respect to other taxable property, or in respect to which a higher rate or per cent. on the true value is imposed than is imposed on the true value of other taxable property, then we deny that such action is a classification; on the contrary, we insist that it is an illegal discrimination, by which more than his share of the public burden is cast upon the tax-payer owning the property discriminated against. Such a classification, or

rather discrimination, is destructive to the great principle which underlies the exercise of the taxing power, namely, equality of burden. It is destructive to what we understand to be the constitutional guaranty provided in the Fourteenth Amendment, which declares that no State shall deny to any person within its jurisdiction the equal protection of the laws.

If by classification is meant the creation or selection of a tribunal for the assessment of a certain kind of property, which tribunal is other and different from the tribunals selected for the purpose of assessing other taxable property, the classification may be legal according to whether each system accords to each class of tax-payers the same legal rights, namely, the right of one class to be heard as to the validity of the assessment if such right is accorded to the other class, and if the same mode or measure of value is applied in each case, but if any substantial right enjoyed by one class is denied to the other class, then the equality of protection is destroyed.

In the case at bar the measure of value adopted in respect to the property of *quasi* public corporations is entirely different from that applied to the property of other tax-payers. In the latter case the measure adopted is the true value of the property. In the former case the measure adopted may result in a valuation two or three times the true value of the property. Such a classification is prohibited by the Fourteenth Amendment, and is declared illegal in the United States Bank cases, herein before cited and referred to; and such a discrimination or classification, if you choose to call it so, is not the exercise of the power of taxation, but is an illegal exaction.

VIII.

Neither the Constitution nor the Laws of California relating to the Assessment of Railroads operated in more than one County provide for Notice to the Owners thereof or Afford them an Opportunity to be Heard at any Stage of the Proceedings, either by Personal Citation or Public Notice or Legislative Enactment, and therefore they Violate that Clause of the Fourteenth Amendment which Declares that no State shall Deprive any Person of Life, Liberty, or Property without due Process of Law.

Under the last preceding head of this argument, for the purpose of establishing inequality, I have shown that the constitution and laws of California in relation to the assessment of the property of *quasi* public corporations, so far as the same is assessed by the State Board of Equalization, make no provision for notice to such corporations—by personal citation, or by publication, or by provision of law—of the proceedings of the board at any stage thereof, and that, therefore, such corporations are not afforded an opportunity to be heard as to the quantity, or as to the value of their taxable property.

I shall not go over the ground again, but shall assume that such conditions have been conclusively shown. This leaves but one question to be considered under this branch of my argument, namely, Under such conditions are such corporations deprived of their property without due process of law?

It was contended in the court below, on behalf of the plaintiff in error—and I presume the contention will be renewed here—that the guaranty of "due process of law"

is confined in its operations to proceedings which are strictly judicial—that is to say, such as are conducted in the courts, both of law and equity. Doubtless cases may be found giving some color to this view, but they are cases where the question was not made directly.

Such cases are entitled to no consideration. If it be confined to such proceedings it would affect tax laws only in such States as collect their taxes by action at law.

There are or have been some such States, but such proceedings are expensive and attended by delays, which materially interfere with the collection of taxes, to the great prejudice of the public interests. The general rule and practice is to provide summary proceedings which are conducted by the officers of the administrative department of the Government. Such proceedings, if surrounded by proper safeguards and checks, are not mischievous. Provision, however, must be made for notice to the tax-payer, and for an opportunity to be heard at some stage of the proceedings, or they are null and void.

In this country it is generally supposed that private property has been made secure against spoliation from whatever source it may come. The right to acquire, *possess*, and enjoy property is indispensable to human happiness. It is, therefore, classed among those inalienable rights, for the protection of which all free governments are instituted.

In a country where so much pains has been taken to throw around private property the protection of carefully framed constitutional guaranties—as in the case of contracts and the limitations upon the execise of the power of eminent domain—it would be passing strange if an avenue has been left open through which private property may be secretly

reached and appropriated to public use without any notice whatever to the owner. Fortunately no such defect exists in the institutions of this country. Under no circumstances, and by no proceedings whatever, however summary they may be, can private property be lawfully taken for public use by any department of the Government without some kind of notice to the owner, and an opportunity for some kind of a trial or hearing. Such is the settled law of this country.

Upon this question the authorities are numerous and conclusive.

In the case of *Stuart* vs. *Palmer* (74 N. Y., 191) all the leading cases upon this subject are reviewed, and I cannot do better than quote at length from the opinion in that case. It is there said:

"It is difficult to define with precision the exact meaning and scope of the phrase 'due process of law.' Any definition which could be given would probably fail to comprehend all the cases to which it would apply. It is probably wiser, as recently stated by Mr. Justice Miller, of the United States Supreme Court, to leave the meaning to be evolved 'by the gradual process of judicial inclusion and exclusion, as the cases presented for decision shall require, with the reasoning on which such decisions may be founded.' It may, however, be stated generally that due process of law requires an orderly proceeding adapted to the nature of the case in which the citizen has an opportunity to be heard, and to defend, inforce, and protect his rights. *A hearing or an opportunity to be heard is absolutely essential.* We cannot conceive of due process of law without this. In his argument in the *Dartmouth College Case*, Webster defined 'due process of law' as a proceeding 'which proceeds upon inquiry and renders judgment only after trial.' Mr. Justice Edwards, in *Westervelt* vs. *Gregg* (12 N. Y., 209), defines it as follows: 'Due process of law undoubtedly means in due course of legal proceedings according to those rules and forms which have been established for the protection of private rights.' Judge Cooley, in his work on Constitutional Limitations, at page 355, after saying that

'due process of law' is not confined to ordinary judicial proceedings, but extends to all cases where property is sought to be taken or interfered with, says that 'due process of law in each particular case means such an exertion of the powers of government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question belongs.' It has always been the general rule in this country in every system of assessment and taxation to give the person to be assessed an opportunity to be heard at some stage of the proceedings. That 'due process of law' requires this has been quite uniformly recognized.

"In *Butler* vs. *Sup'rs of Saginaw* (26 Mich., 22), where a tax had been imposed for building drains, Judge Cooley says: 'It is not the province of any mere legislative direction to impose pecuniary burdens upon the people. The power to tax is indeed plenary; but taxation implies public interest, and in cases like these now in question it also implies proceedings *in pais*, in some of which the tax payers have a right to take part and be heard. Any attempt to lay the burden in disregard of these principles must necessarily be inoperative.' In *Patten* vs. *Green* (13 Cal., 325) Baldwin, J., says: 'We think it would be a dangerous precedent to hold that an absolute power resides in the supervisors to tax land as they may choose without giving any notice to the owner. It is a power liable to great abuse. The general principles of law applicable to such tribunals oppose the exercise of any such power.' In *Philadelphia* vs. *Miller* (49 Penn., 440) Agnew, J., speaking of taxation, says: 'Notice, or at least the means of knowledge, is an essential element of every just proceeding which affects rights of persons or property.' In *Matter of Trustees of N. Y. Prot. Epis. Public Schools* (31 N. Y., 574) Judge Denio says: 'It is manifestly proper that the taxpayers should have notice of the imposition proposed to be laid upon them and an opportunity for making suggestions and explanations to the proper administrative board or officer. In *Ireland* vs. *City of Rochester* (51 Barb., 414) Judge James C. Smith, speaking of the imposition of assessments, says: 'It is in the nature of a judicial proceeding against them, and its effect is to take their property for public use. * * * It is a plain principle of justice, applicable to all judicial proceedings, that no per-

son should be condemned, or shall suffer judgment against him, without an opportunity to be heard;' and he says that an act assessing 'persons without notice transcends the power of the Legislature, and is itself void.' *In the Matter of Ford* (6 Lans., 92) Judge Gilbert says that the duties of assessors in making assessments are of a judicial nature, and that 'it is a fundamental rule that in all judicial or *quasi* judicial proceedings whereby the citizen may be deprived of his property he shall have notice and an opportunity of a hearing before the proceedings can become effectual.' That assessors act judicially, see, also, *Barhyte* vs. *Shepherd*, (35 N. Y., 238) and *Clark* vs. *Norton*, (49 N. Y., 243.)

"In *Overing* vs. *Foote* (65 N. Y., 363) Mr. Commissioner Reynolds says: 'The general theory under our laws for taxation of property is that the citizen to be affected must have some sort of notice of the proceeding to be had against his property, and that in some form he may be heard, if wrong is apprehended, before any portion of his estate is seized for the support of government; and I think all our laws for the assessment of property for the purpose of taxation are founded upon this notion of justice.' In *Davidson's Case* in the Supreme Court of the United States, above referred to, the doctrine that the citizen is entitled to due process of law in the imposition of assessments is distinctly recognized. In that case an assessment upon the real estate of the plaintiff in error in the city of New Orleans for draining the swamps of that city was resisted in the State courts, and was brought by a writ of error to the United States Supreme Court, on the ground that the proceeding deprived the owner of his property without due process of law, and the court refused to interfere with the assessment on the ground that the party assessed had notice and an opportunity to appear before a proper tribunal and contest. Mr. Justice Bradley, writing one of the opinions, says: 'In judging what is due process of law respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessments for local improvements, or none of these; and if found to be suitable or admissible in a special case it will be adjudged to be 'due process of law; but if found to be arbitrary, oppressive, and unjust it may be declared to be not due process of law.' In *Murray's Lessee* vs. *Hoboken Land and Improvement Co.* (18 How., [U. S.] 272) it was held that the

provision as to 'due process of law' was a restraint on the legislative as well as the executive and judicial powers of the Government. Judge Cooley, in his valuable work on Taxation, at page 265, says: 'In such proceedings, therefore, it must be a matter of the utmost importance to the person assessed that he should have some opportunity to be heard before the charge is fully established against him; and it would seem to be a dictate of strict justice that the law should make reasonable provisions to secure him, as far as may be, against partiality, malice, or oppression;' and on page 266 he says: 'We should say that notice of proceedings in such cases and an opportunity for a hearing of some description were matters of constitutional right. It has been customary to provide for them as a part of what is due process of law for these cases; and it is not to be assumed that constitutional provisions carefully framed for the protection of property were intended or could be construed to sanction legislation under which officers might secretly assess one for any amount in their discretion without giving him an opportunity to contest the justice of the assessment.'

"While it may be said that there is no authority directly in point, yet, as has been shown, there is much judicial expression in favor of the proposition I am endeavoring to maintain. The cases must have been extremely rare in this country where assessments have been imposed without notice or an opportunity to be heard; and hence the application of 'due process of law' to the subjects of assessments and taxation has not been much discussed. The case nearest in point is *Davidson's Case.* That, as has been seen, was a case of assessment, and the United States Supreme Court had jurisdiction of it only because it involved the constitutional provision as to 'due process of law.' If the citizen, in the case of assessments, is not entitled to the protection of this constitutional provision, then the court would have dismissed that case on that ground, but it considered the case upon the merits, and decided that there was due process of law.

"No case, it is believed, can be found in which it was decided that this constitutional guaranty did not extend to cases of assessments, and yet we may infer, from certain dicta of judges, that their attention was not called to it, or that they lost sight of it in the cases which they were considering. It has sometimes been intimated that a citizen

is not deprived of his property within the meaning of this constitutional provision by the imposition of an assessment. It might as well be said that he is not deprived of his property by a judgment entered against him. A judgment does not take property until it is enforced, and then it takes the real or personal property of the debtor. So an assessment may generally be enforced not only against the real estate upon which it is a lien, but, as in this case, against the personal property of the owner also, and by it he may just as much be deprived of his property, and in the same sense as the judgment-debtor is deprived of his, by the judgment."

The case of *Stuart* vs. *Palmer* is approved by the Supreme Court of California in *Mulligan* vs. *Smith* (59 Cal., 206.) In that case Mr. Justice McKee said:

"For it is a principle which underlies all forms of government by law that a citizen shall not be deprived of life, liberty, or property without due process of law. *The Legislature has no power to take away a man's property, nor can it authorize its agents to do so, without first providing for personal notice to be given to him, and for a full opportunity of time and place and tribunal to be heard in defense of his rights. This constitutional guaranty is not confined to judicial proceedings, but extends to every case in which a citizen may be deprived of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature.*"

And Mr. Justice McKinstry, in the same case, said:

"I concur. To what has been said I add: In my opinion the statute provides no notice or process by means of which the property owners can be subjected to the judgment of the county court. The act is therefore void. (*Stuart* vs. *Palmer*, 74 N. Y., 183; *Murray's Lessee* vs. *Hoboken Land and Im. Co.*, 18 How., U. S., 272; Cooley on Tax., 266.)"

The foregoing cases, it is true, are cases of taxation for local improvements, and while it is conceded upon the other side that in such cases notice or an opportunity to be heard is

is indispensable to constitute due process of law, yet it is denied that this rule extends to cases of taxation for general purposes or for purposes of revenue. There is nothing in these cases, or other cases of the same class, some of which will be cited further on, which sustains any such distinction. Nor is there anything in the nature of either of these two classes of cases which gives color or sanction to such a distinction. In all legal aspects the two classes are the same. They both arise from the exercise of the same power—the power of taxation. The effect of the exercise of this power upon private property is the same in the one class as in the other—the effect is to take private property for public use. It is true that the use in the one case differs from the use in the other, but upon what rational ground can it be held that private property cannot be taken, without affording to the owner an opportunity to be heard, for one kind of public use, but may be taken without such opportunity to be heard for another kind of public use? The object of the prohibition against depriving any person of his property without due process of law is to make him secure in its possession and enjoyment against arbitrary spoliation. The prohibition is designed for his security and protection *in all cases*, and is an indispensable provision in the organic law of all free States or bodies politic. Such security and protection are unaffected by the nature of the purpose for which his property is taken; or, if it is, then this boasted guaranty is in part, at least, a hollow mockery, a delusion, and a snare. This ought not to be and cannot be true. If it be true then it may be said, in the language of Chief Justice Marshall in respect to the Federal Constitution, in the case of McCulloch against Maryland, the Fourteenth Amendment to the Federal

Constitution "is a splendid bauble." As Mr. Justice McKee says in the case last cited:

"This constitutional guaranty is not confined to judicial proceedings, but extends to *every case* in which a citizen may be deprived of life, liberty, or property, whether the proceeding be judicial, administrative, or executive in its nature."

In a late case decided by the supreme court of California it was held, in harmony with the foregoing declaration of Mr. Justice McKee, that an opportunity to be heard is an indispensable factor in due process of law in cases of taxation for purposes of revenue. The case has not yet been reported, but I have filed a certified copy of the opinion with the clerk of this court. So much of the opinion, however, as relates to this question is quoted further on.

The action was brought by *The People, etc.*, against *The Pittsburg Railroad Company* to recover taxes—State and county—for the fiscal year 1880–'1. The assessment declared on was made after the Board of Equalization had adjourned *sine die*, and was made under the provisions of Section 9 of the act of April 18, 1874 (Statutes of Cal., 1873–'4, p. 477), which reads as follows:

"The assessor may, at any time prior to the fourth Monday in October in each year, specially assess any property which may have been omitted and which shall not be entered upon the regular assessment roll; and, if he make any such special assessment, he shall forthwith deliver a copy thereof to the tax-collector and the original to the auditor, who shall charge the tax-collector with the amount of taxes due thereon; and all such special assessments shall be as valid and shall have the same force and effect as regular assessments."

This section affords the tax-payer no notice or an opportunity to be heard, and the court, for that reason, held it to be unconstitutional. The court said:

"The action is to recover city and county and State taxes for the fiscal year 1880–'1, as entered upon the 'Supplemental Tax-roll' under the act of April 18, 1874." (Stats. 1873–'4, p. 477.)

"The assessment was made after the Board of Equalization had finally adjourned, and under the ninth section of the act above cited.

"The constitution of the State contemplates first, assessment by the assessor; second, action by the County Board of Equalization; third, action by the State Board of Equalization. Under section 9 of Article XIII the tax-payer is entitled to notice of the meetings of the county board at which his taxes may be increased. But the 9th section of the act of 1874 attempts to provide for an assessment by the assessor (*of the city and county of San Francisco*), which is arbitrary and absolute, without the possibility of equalization by the Board of Supervisors, as it provides for an assessment to be made after the time within which the board can act. The Legislature has no power thus to deprive the citizen of an opportunity of appearing before the board for the purpose of contesting the amount assessed against him. The 9th section is violative both of the constitution of the State and of the Fourteenth amendment of the Constitution of the United States."

This case establishes in California the doctrine for which I contend, that in cases of taxation for revenue, as well as in cases of taxation for local improvements, an opportunity to be heard is an indispensable element in due process of law.

Of course there are certain kinds of taxes to which this rule does not apply, because its application would be of no service to the tax-payer. Of this class are specific taxes, such as poll-taxes, taxes on trades and occupations and on certain kinds of business, not based on the amount or volume of business transacted. These taxes are fixed in amount by the law, and no judicial inquiry is necessary in order to ascertain the amount of the tax to be paid in such cases.

The tax-payer is notified and informed *by the law itself* of all that he need to know for his security and protection against illegal exactions; but where the taxes are levied upon the *ad valorem* principle a judicial inquiry and investigation becomes necessary to ascertain and determine the ownership and value of the property, both of which are open to contest by the tax-payer, and it is indispensable to his security and protection against spoliation that he should have an opportunity to be heard as to his ownership of the property and as to its value. In such cases the inquiry is judicial, because the result depends upon evidence *pro* and *con;* and I have yet to learn that there is any case arising under the laws of any State or of the United States which involves judicial investigation in which the party affected thereby is not entitled to be heard, or, at least, entitled to an opportunity to be heard. This distinction, in respect to notice between these two kinds of taxes, is very clearly drawn and stated by this court in the case of *Hagar* vs. *Reclamation District No.* 108 (111 U. S., 701). That case, as I read it, sustains the doctrine for which I contend—that, in respect to taxes on property levied upon the *ad valorem* principle, an opportunity to be heard on the part of the tax-payer is an indispensable factor in due process of law. If such is not the true reading of that case, why did the court indulge in a long discussion of the facts for the purpose of showing that Hagar had had his day in court? This discussion would not have been had had the court been of the opinion that he was not entitled to be heard at all.

The same is true of the *Kentucky Railroad Tax Cases* recently decided. They were actions for the collection of taxes levied on property for the purposes of revenue. It

was contended on the part of the railroad companies that the laws of Kentucky afforded them no opportunity to be heard in respect to the amount and value of their property. This court did not answer this contention by declaring that an opportunity to be heard in such a case is not a necessary element in due process of law; but, on the contrary, assumed that it was, and proceeded to show that, contrary to their contention, the laws in question did afford them an opportunity to be heard.

In none of the cases in relation to assessments for local improvements, so far as I am advised, has the necessity for notice to the tax-payer been confined to such cases; on the contrary, the language and reasoning of the judges has been general and broad enough to cover as well all assessments of whatsoever kind. In the case of *Thomas* vs. *Gain* (35 Mich., 164) Mr. Ch. J. Cooley said:

"The principle of the statute being thus found to be unsound it does not become necessary to consider details; but as new legislation will probably be procured it seems proper to declare in this case that parties whose property is to be taken under summary tax proceedings are entitled as of right to be heard at some stage in the proceedings before the tax shall become an established charge against them or their property. It was said by *Agnew, J.*, in *Philadelphia* vs. *Miller*, 49 *Penn. St.*, 440, 448, that 'notice, or at least the means of knowledge, is an essential element of every just proceeding which affects rights of persons or property.' The principle was recognized by this court in *Butler* v. *Supervisors of Saginaw*, 26 *Mich.*, 22. In England, until appeals were given from sewer assessments, it was held that the party taxed might sue the officer in trespass or replevin for a levy on his property, and in that suit might defeat the assessment if he could show that he was not benefited, as the commissioners had adjudged. In this country we do not allow the justice of an assessment to be inquired into in a suit to charge the officers with a personal liability; but it follows legitimately

from this that parties taxed must have an opportunity to be heard regularly at some stage in the proceedings. Their rights are not to be concluded by proceedings which are wholly *ex parte*."

To the same effect are the following cases:

Brown vs. *City of Denver*, 7 Col., 305.
Campbell vs. *Twiggins*, 83 Ind., 473.
Gatch vs. *Des Moines*, 63 Iowa, 718.
Patten vs. *Green*, 13 Cal., 329.
State vs. *Diake*, 33 N. J., 194.
Darling vs. *Gunn*, 50 Ill., 424.
Philadelphia vs. *Miller*, 49 Penn. St., 448.

The claim that notice to the tax-payer is not required by due process of law, when the power of taxation is exercised for the purposes of revenue, is opposed by the universal usage and custom of the country. In all revenue laws, so far as I am advised, it has been the universal practice in this country to provide an opportunity for the tax-payer to be heard, at some stage of the proceedings, before the tax has become a final change against him or his estate. (See note to *Hagar* vs. *Reclamation District* No. (108, 111 *U. S.*, 713.) This practice, if not conclusive, bears strong testimony in support of the doctrine for which I contend. There is nothing contrary to these views in *State Railroad Tax Cases*, (92 *U.S.*,) or the case of *Hagar* vs. *Reclamation District* No. 108, (111 *U.S.*,) or in the *Kentucky Railroad Tax Cases* recently decided. In the first and last of these cases the law under which they arose prescribed a day certain on which the assessors were to meet for the purpose of assessing the railroads in question. The law also designated a particular place where the assessors were to meet for that purpose. In

the second and last of said cases the tax in question could only be collected by an action at law, in which the defendant would have an opportunity for a full defense. In all three of these cases it was held that the law afforded all the notice required by the constitutional guaranty of due process of law. With these decisions no fault is found; on the contrary, I agree that they are consistent with the constitutional requirement of due process of law as applied to cases of taxation, but the case at bar is readily distinguishable from these cases. The law of California in relation to the assessment of railroads operated in more than one county does not fix a day certain on which the board of assessors are to meet for the purpose of making their assessment. On the contrary, the language of the law is that they shall make their assessment *on* or *before* a certain day, and, although the law requires them to meet on the second Monday of each month of the year, yet it also authorizes them to hold special meetings at the call of the chairman of the board. Their assessments, therefore, may be made at a regular session or special meeting, as they may be advised, of which special meetings the law affords no notice to any one. Thus the day at which the assessment will be made is not made known to the tax-payer, but is left doubtful and uncertain and subject to the mere will or caprice of the Board of Assessors. Again, the law of California does not provide that the tax in such case shall be collected by an action at law *only;* on the contrary, it provides that they may be collected by a forced sale of the property by the tax collector of the county in which it is situated. It is true that the law places it in the discretion of the controller of State to direct the tax collector, after having once offered the property for sale, to

withdraw it and bring an action for the recovery of the tax. This the controller can do or not as he pleases, and, if he does not do it, the tax-payer is not allowed any opportunity to contest the validity of the tax; so the tax does not become a final charge against the tax-payer or his estate, as was the case in the Kentucky cases, and also in the Hagar case, after action brought and judgment obtained, but it becomes final in advance of any action that may be brought. The assessment, when made, is declared to have the force and effect of a judgment and execution against the property of the tax-payer, and may be sold under it as under a judgment and execution without any suit at law. These conditions found in the California law, it is submitted, clearly distinguish this case from those above referred to.

IX.

The Constitution of California, in Relation to the Taxation of the Property of quasi Public Corporations, was not Adopted in the exercise of the power to Alter or Repeal general laws under which Corporations are formed Reserved to the States; but if it be held otherwise, then that the State cannot, under the Pretence of Exercising such Reserved Power, Deprive such Corporations, in Respect to their Property, of the Protection Afforded by the Guaranties of the Federal Constitution.

The claim made on the part of plaintiff in error, that the discriminations in question can be sustained as an exercise of the reserved power of the Legislature to alter or repeal all general laws in relation to corporations, is far fetched, and in all respects untenable.

Both the old and the new constitution of California provide that corporations, other than municipal, shall not be created by special act, but may be formed under general laws, which general laws may be altered or repealed.

I have never been able to discover any power in the last clause, in relation to alteration or repeal, which the Legislature would not have possessed had such clause been omitted. In view of the construction which has been put upon it by the courts, I can understand that, where corporations may be created by special acts, such a clause invests in the Legislature a power which otherwise they might not possess. But where special legislation is forbidden and corporations cannot be created at all, but may be formed under *general laws*, I am unable to see any need for such a reservation, or how, by such a reservation, the power of the Legislature over corporations is in any respect increased or enlarged. I have always supposed that, by virtue of their power to make laws alone, the Legislature possessed the power to amend or repeal all *general laws*, and I am not aware that there is, or ever has been, any exception to this rule. The effect of the exercise of such power upon persons who have acquired rights and property, under the law amended or repealed, is easily ascertained by reference to any work on statutes.

Does an express reservation of this power, as to certain general laws, give the Legislature any other or greater control over such designated general laws than it has over any other class of general laws, and does an amendment or repeal of such designated general laws have any wider or more destructive effect upon rights and property acquired under them than would follow an amendment or repeal in other cases? I am unable to perceive how an amendment or

repeal could have any wider scope or reach further in the former than in the latter case.

Yet there seems to be an impression with the bench and bar that there is a vast reservoir of power concealed in this reservation clause which, if recklessly tapped by the Legislature, would bring upon the rights and property of corporations disasters which would not flow from an exercise of the general power of amendment or repeal in other cases. But, for the purposes of the present case, it is not necessary to pursue this matter further. It may be safely conceded that this reserved power is all that it is claimed to be.

In support of the plaintiff's contention, it is argued that in passing the act of 1861, under which railroad corporations which were in existence at the time of the adoption of the new constitution in 1879 were formed, the State, by its Legislature, might have provided any system of taxation for them that it thought proper, and that, in the exercise of the reserved power of alteration, it could, at any time afterwards, have provided such a system as the one in question, as a condition precedent to their further existence, and that this has been done by the adoption of the new constitution.

There are two answers to this argument, either of which is conclusive.

First. The Constitution of California is divided into articles, and each article is divided into sections.

The first article contains a declaration of rights. The second treats of the right of suffrage. The third deals with the distribution of powers; and so on until we come to the twelfth, which treats of corporations. It contains twenty-

four sections regulating and providing for the regulation of corporations.

Under this article not a word is said about the future existence of existing corporations, and no conditions are annexed to their continued existence. No change is made which affects any of the provisions of the act of 1861 in relation to railroad corporations, except as to the exercise of the power of eminent domain, which is immaterial to the present purpose. This article creates no conflict between itself and that act except in the particular mentioned. Not a word is said upon the subject of taxation.

Next comes Article XIII. It treats solely of "Revenue and Taxation." Such is the title to the article. Nowhere in the article do we find any conditions imposed upon the continued existence of railroad corporations.

It provides a scheme for the taxation of their property, but it is not provided that they must submit to and accept that scheme or suffer decapitation; nor is there anywhere in the Constitution any provision looking to any such result. On the contrary, the first section of Article XXII declares that all laws in force at the adoption of the Constitution, not inconsistent therewith, shall remain in full force until altered or repealed by the Legislature. As already remarked, there is no inconsistency between the railroad act of 1861 and any provisions contained in the Constitution, except in relation to proceedings to be taken in the exercise of the power of eminent domain.

From this arrangement of the several subjects with which the Constitution deals, and from these express provisions, it is obvious that the framers of that instrument did not suppose they were exercising this reserved power when they

were dealing with the subject of revenue and taxation. All changes which they desire to make in the law of corporations, naturally and logically, they would have inserted in the Article XII, which, as already stated, is exclusively devoted to that subject. This reserved power is liable to abuse, and whoever asserts that it has been put to use should furnish testimony of the most satisfactory and conclusive nature. The fact of its use should be too apparent to require for its development a resort to doubtful inference or ingenious argument.

Next. This reserved power, however far-reaching it may be, cannot be so wielded as to deprive any person or persons of the protection afforded to them or their property by any of the guaranties of the Federal Constitution.

Under the English constitution the power of creating corporations is vested in the Crown. By letters patent the king creates them, and as such letters issue "of his special grace, certain knowledge and mere motion" he may annex such restrictions and conditions, *consistent with the constitution and laws of England*, as he may think proper; but they must all be contained in the charter, for the charter having been issued according to the laws of England, the king loses all control over it.

Such conditions cannot be repugnant to the laws of England, for if they be, the charter is void. Thus he cannot reserve the right to remove members without cause or legal process, because it is a maxim of English law that no man ought to answer for his freehold, franchises, or other thing without original writ *secundum legem terræ;* nor can he reserve the right to remove all the members of the corporation, with or without cause, for that would render the

charter void. It being in the option of the King to create franchises, the law always considers them, when created, as raised for the benefit of the public, and annexes to them such a degree of permanency as will best subserve the public interest. The corporation being created, the rights, liberties, immunities, privileges, and franchises vested in it become estates, and cannot in any respect be disturbed or taken away except by due process of law. (*The King* vs. *Amery*, 2 Durnford & East, 515; *The King* vs. *Pasmore*, 3 Id., 179.)

Even the King of England cannot violate the constitution and laws of England, nor can he acquire power to violate them under the pretext of a condition to a charter. Whatever the constitution and laws of England allow him to do he may reserve the power to do, but beyond this he cannot go.

But the theory of the English constitution is that Parliament is omnipotent, and hence it has been held in England that the charter of a corporation may be repealed; or, in other words, that the corporation may be dissolved by an act of Parliament without the intervention of the courts. Yet the exercise of this power, so arbitrary and so repugnant to everybody's sense of natural right, has only twice found a place in English history—one being the suppression of the Order of Templars in the time of Edward II, and the other being the suppression of the religious houses in the time of Henry VIII.

When, in 1783, it was proposed by act of Parliament to remodel the charter of the East India Company, the measure was strenuously opposed by Mr. Pitt and Lord Thurlow. The latter denounced the measure as being not only a

violation of the charter of the company, but a violation of the constitution of England. He characterized it as "an atrocious violation of private property, *which cut every Englishman to the bone.*" (Angell & Ames on Corporations, sec. 767.)

A similar view of the nature of such a measure was taken in France, in 1786, in the discussion which arose on the new charter then recently granted to the French East India Company. Those opposed to the charter denied the legal existence of the company, on the ground that the king had been surprised into making the grant; that the grant had not been perfected by the issuing of letters patent, nor duly registered by the Parliaments, and that it might, therefore, be lawfully suppressed, and ought to be, as an illegal grant of exclusive privileges, contrary to the true principles of commercial philosophy. On the part of the company it was contended that their grant was irrevocable; that it was but a renewal and confirmation of the charter of the old company, which had been suspended in 1769, in consequence of the immense losses of capital sustained in the calamitous war of 1756 (but which suspension was, at the time, solemnly protested against by the Parliament of Paris as illegal); that their new grant might still be perfected by letters patent, which the faith of the king was pledged to issue, and that the privileges thus granted to them were irrevocably vested as a right of property, of which *they could not be deprived by any authority in the kingdom.* Such were the contentions upon both sides, but they both agreed that, if the charter had regularly issued according to the forms of the French law, it was irrevocable, unless forfeited by non-user or misuser. (4 Wheaton, 713—*note.*)

Omnipotence is not included in the powers which are possessed by legislative bodies in America. As remarked by Mr. Justice Miller, in the case of the *Loan Association* vs. *Topeka* (20 Wall., 662), "the theory of our government, State and National, is opposed to the deposit of unlimited power anywhere."

The power to destroy or annul the charter of a private corporation did not exist in Congress or Legislatures—at least until this reserved power came into use. Prior to that time the only powers which they had over charters were such as, under the English constitution, were vested in the Crown. As the king could grant charters, so could they. As he could annex to the grant and include in the letters patent such conditions, *consistent with the law of the land*, as he saw proper, so could they; but, as he could not violate the constitution and laws of England, or acquire the power to do so by a reservation, neither could they. As he could not by a reservation acquire the power to take private property or impair vested rights—a power which can be exercised only by due process of law—neither could they. As he could not, after having made the grant, alter it or impose new conditions, neither could they. As he could not revoke the grant or repossess himself of the franchises, except by judicial proceedings and for misuser or non-user, neither could they. That such was the case was first decided in 1860, in *Wales* vs. *Stetson* (2 Mass., 146), and again in 1819, by this Court, in the Dartmouth College case, the ground of the decision being that the charters of private corporations are contracts, and cannot, therefore, be impaired by law.

In course of time this doctrine came to be considered as of mischievous tendency as favoring the growth of monopoly.

The mischief, however, if any, did not flow from the doctrine announced in that case, for that was just and consistent with the fundamental principles of American constitutional law. The threatened mischief had its source in the careless and improvident manner in which charters had been and were being granted. Instead of guarding against monopoly, and perhaps other evils, by inserting *in the charters* such restrictions and conditions as would have prevented the results complained of, legislatures were in the practice of granting franchises with few, if any, restrictions or conditions. They were not cautious or provident in making their contracts, and when they found that they had made a bad contract they began to grumble because they did not possess the power to remake it or remodel it, so as to render it more favorable to the interests of the public. At last the brilliant idea occurred to them of inserting in the charter, or in a general law, or in the Constitution, a clause reserving the power to alter, change, and annul such contracts at their pleasure.

What has been said points out the boundaries beyond which this reserved power cannot reach. In framing general laws for the organization of corporations, the State can insert no provisions which are not consistent with the Constitution of the United States, and by parity of reason they cannot do so afterwards in the exercise of this reserved power.

The power to amend cannot be greater than the power to make.

Neither in framing nor in amending such laws can a State deny to any corporation any right or immunity which it derives from the Constitution of the United States.

It cannot deny such corporation the right to enter the courts of the State, or of the United States, for the enforcement of its rights and the redress of its wrongs. It cannot take the property of such corporation for public use without compensation.

It cannot deprive such corporation of its property without due process, nor deny to it the equal protection of the laws. These principles are self-evident. To deny them is to hold that the States have the power, by their constitutions and laws, to overturn the Constitution of the United States.

The States may now do in respect to corporations just what it was held in the Dartmouth College case they could not do. They may change the contract which constitutes the charter of the corporation. They may modify or take back the franchises and privileges which they have granted.

They may annex to such franchises new conditions of possession and enjoyment, provided such conditions are not repugnant to the Constitution, treaties, and laws of the United States. Further than this they cannot go. In respect to contracts made and rights of property acquired—in respect to the enforcement of such contracts and the possession and enjoyment of such property, such corporations are, equally with natural persons, protected by the Constitution of the United States.

These conclusions are fully sustained by the decisions of this Court.

In 1870 the Legislature of the State of Wisconsin passed a statute to the following effect:

"It shall not be lawful for any fire insurance company, association, or partnership incorporated by or organized

under the laws of any other State of the United States or foreign government for any of the purposes specified in this act, directly or indirectly, to take risks or transact any business of insurance in this State, unless possessed of the amount of actual capital required of similar companies formed under the provisions of this act; and any such company desiring to transact any such business as aforesaid by any agent or agents in this State shall first appoint an attorney in this State, on whom process of law may be served containing *an agreement that such company will not remove the suit for trial into the United States circuit court or Federal courts, and file in the office of the secretary of State a written instrument, duly signed and sealed, certifying such appointment, which shall continue until another is substituted.*"

This statute being in force, the Home Insurance Company, a corporation formed under the laws of the State of New York, being desirous of engaging in business in the State of Wisconsin, established an agency there, and in compliance with the provisions of said statute filed in the office of the secretary of State of Wisconsin an appointment of H. S. Durand as their agent in it, on whom process might be served. This power of attorney contained the following clause:

"And said company agrees that suits commenced in the State courts of Wisconsin shall not be removed by the acts of said company into the United States circuit or Federal courts."

Being thus established in the State, the company issued a policy of insurance, and a loss having occurred under it, an action thereon was brought against the company in one of the State courts. The company entered an appearance, and moved that the action be transferred for trial to the circuit court of the United States, pursuant to the provisions of the twelfth section of the Federal Judiciary act of

1789. The section under which the company demanded the removal is as follows:

"If a suit be commenced in any State court * * * by a citizen of the State in which the suit is brought against a citizen of another State, * * * and the defendant shall at the time of entering his appearance in such State court file a petition for the removal of the cause for trial into the next circuit court to be held in the district where the suit is pending, * * * and offer good and sufficient surety for his entering in such court on the first day of its session copies of said process against him, and also for his there appearing, * * * it shall then be the duty of the State court to accept the surety and proceed no further in the cause."

The court denied the motion for a removal. The case was tried and a judgment against the defendant was rendered. The company appealed to the supreme court of the State, which affirmed the judgment, holding that the statute of the State and the agreement of the company under it were not repugnant to that clause of the Constitution of the United States which declares "that the Constitution of the United States and the laws made by Congress in pursuance thereof shall be the supreme law of the land," and they were, therefore, binding upon the company.

Not satisfied with this solution of the question, the company brought the case to this Court. This Court, in an elaborate and well-considered opinion, delivered by Mr. Justice Hunt, reversed the judgment of the supreme court of Wisconsin, holding that the statute and agreement in question were repugnant to that clause of the Federal Constitution which declares the Constitution of the United States and the laws made in pursuance thereof the supreme law of the land. The points decided were:

"1st. The Constitution of the United States secures to citizens of another State than that in which the suit is brought an *absolute* right to remove their cases into the Federal courts, upon compliance with the terms of the act of 1789.

"2d. The statute of Wisconsin is an *obstruction* to this right, is repugnant to the Constitution of the United States and the laws in pursuance thereof, and is illegal and void.

"3d. The agreement of the insurance company *derives no support from an unconstitutional statute*, and is void as it would be *had no such statute been passed.*" *Insurance Company* vs. *Morse* (20 Wallace, 445.)

The question involved in that case differs from the question under consideration in circumstance, but not in principle. The solution of each turns upon the power of a State to set aside the Federal Constitution.

If we look to the comparative merits of the two questions, the question under discussion must be conceded to be of vastly the most importance. Whether a citizen is entitled, under the Federal Constitution, to have his contracts, or his rights and liablilities under them, litigated and determined in the Federal courts instead of the State courts, is a question of minor importance to the question whether he shall be allowed at all, in either forum, to invoke the protection of the Federal Constitution against a violation of his rights under it. The former merely involves a choice of forums, the other involves a principle—the right to appeal at all, in any forum, to the protection which the Federal Constitution professes to afford him in a matter of vital importance.

In the case of the *Commonwealth* vs. *Essex Co.* (13 Gray, 253), Chief Justice Shaw said:

"Does this come within the power of the legislature to amend or alter?

"It seems to us that this power *must have some limit*, though

it is difficult to define it. Suppose an authority has been given by law to a railroad corporation to purchase a lot of land for purposes connected with its business, and they purchase such lot from a third person, could the Legislature prohibit the company from holding it? If so, in whom would it vest; or could the Legislature direct it to revest in the grantor, or escheat to the public, or how otherwise?

"Suppose a manufacturing company, incorporated, is authorized to erect a dam and flow a tract of meadow, and the owners claim gross damages, which are assessed and paid, can the Legislature afterwards alter the act of incorporation so as to give to such meadow owners future actual damages?

"Perhaps from these extreme cases—for extreme cases are allowable to test a legal principle—the rule to be extracted is this: that where, under power in a charter, *rights have been acquired and become vested*, no amendment or alteration of the charter can take away the property or rights which become vested under a legitimate exercise of the powers granted."

In *Tomlinson* vs. *Jessup* (15 Wall., 454), Mr. Justice Field said:

"The object of the reservation, and of similar reservations in other charters, is to prevent a *grant of corporate rights and* privileges in a form which will prevent legislative interference with their exercise, if the public interest should at any time require such interference. It is a provision intended to preserve to the State control over its *contract* with the corporators, which without that provision would be irrepealable, and protected from any measures affecting its obligation." * * *

"The reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities derived by its *charter directly* from the State."

In the case of *Miller* vs. *The State* (15 Wall., 478), Mr. Justice Clifford said:

"Power to legislate, founded upon such a reservation in a charter to a private corporation, *is certainly not without limit*, and it may well be admitted that it cannot be exercised *to take away or destroy rights acquired by such a charter*,

and which by legitimate use of the powers granted, have become vested in the corporation; but it may be safely affirmed that the reserved power may be exercised, and to almost any extent, to carry into effect the original purposes of the grant, or to secure the due administration of its affai so as to protect the rights of stockholders and of creditors, and for the proper distribution of the assets.

"Such a reservation, it is held, will not warrant the Legislature in passing laws to change the control of an institution from one religious sect to another, or to divert the fund of the donors to any new use inconsistent with the intent and purpose of the charter, or to compel subscribers to the stock, whose subscription is conditional, to waive any of the conditions of their contract."

In the case of *Sage* vs. *Dillard* (15 B. Monroe, 357), it was held that such a reservation does not imply the power to alter or change the *vested* rights acquired by the corporators under the charter, and to add new parties and managers without the consent of the corporators.

In the case of the *Holyoke Company* vs. *Lyman* (15 Wall., 500), Mr. Justice Clifford again said:

"The provision * * * declaring that acts of incorporation shall be subject to amendment, alteration, or repeal at the pleasure of the Legislature reserves to the Legislature authority to make any alteration or amendment of a *charter* granted subject to it, which will not defeat or substantially impair the object of the grant, or *any rights vested under it*, and which the Legislature may deem necessary to secure either that object or other *public* or *private* rights."

In the case of the *Railroad Co.* vs. *Maine* (96 U. S. Rep., 510), while discussing the question in hand, this Court, by Mr. Justice Field, said:

"By the reservation * * * the State retained the power to alter it (the charter) in all particulars constituting the *grant* to the new company formed under it, of *corporate* rights, privileges, and immunities. The existence of the

corporation, and its franchises and immunities, *derived directly from* the State, were thus kept under its control. *Rights and interests acquired by the company, not constituting a part of the contract of incorporation, stand upon a different footing.*"

Section 2, Article XIX, of the constitution of California reads as follows:

"No corporation now existing, or hereafter formed under the laws of this State, shall, after the adoption of this constitution, employ, directly or indirectly, in any capacity, any Chinese or Mongolian. The Legislature shall pass such laws as may be necessary to enforce this provision."

Section 179 of the Penal Code reads as follows:

"SECTION 179. Any corporation now existing, or hereafter to be formed under the laws of this State, that shall employ, directly or indirectly, in any capacity, any Chinese or Mongolian, shall be guilty of a misdemeanor, and, upon conviction thereof, shall, for the first offense, be fined not less than five hundred dollars nor more than five thousand dollars, and upon the second conviction shall, in addition to said penalty, forfeit its charter and franchise, and all its corporate rights and privileges, and it shall be the duty of the attorney general to take the necessary steps to enforce such forfeiture."

These constitutional and statutory provisions were claimed to be repugnant to the Fourteenth Amendment in Parrott's Chinese case in the circuit oourt of the United States for the district of California, Judges Sawyer and Hoffman presiding. In answer it was claimed on the part of the State that such provisions were permissible as an exercise of this reserved power. After tracing the history of this power, and reviewing the decisions of this and other courts as to its scope and limits, Judge Hoffman said:

"These citations sufficiently indicate the nature, object, and, to a certain degree, the extent of the powers reserved in the clause in question, and although they do not define their limits in every direction, they lay down certain *ne plus ultra* boundaries which the Legislature may not pass.

"Over all the rights, privileges, and immunities conferred by the charter upon the corporation, and which are derived from the charter, the Legislature has control. But, in the language of the Supreme Court, 'the rights and interests acquired by the company, and not constituting a part of the contract of corporation, stand upon a different footing.' (96 Otto, 499.) The right to use a corporate name and seal, the right under that name to sue and be sued, to acquire property, and to contract, are rights which owe their existence to the charter. But when a contract has been made or property acquired by the lawful exercise of the granted powers, the contract is as inviolable, and the right of property with everything incidental to that right as sacred, as in the case of natural persons.

"It is not merely the title to the property that is protected from legislative confiscation, but that which gives value to all property—the right to its lawful use and enjoyment.

"It would be a 'mockery, a delusion, and a snare,' to say to a corporation 'The title to the property you have lawfully acquired we may not disturb, but we may prescribe such conditions as to its use as will utterly destroy its beneficial value.' It need hardly be said that no reference is here intended to the power of the State to enact police laws; that is, laws to promote the health, safety, or morals of the public. To such laws corporations are amenable to the same extent as natural persons, and no further.

"The law in question does not affect to be a police law. Its validity, if applied to natural persons, was not contended for at the bar. The authority to pass it was sought to be derived exclusively from the reserved power over corporations. It forbids the employment of Chinese.

"If the power to pass it exists, it might equally as well have forbidden the employment of Irish, or Germans, or Americans, or persons of color; or it might have required the employment of any of these classes of persons to the exclusion of the rest. It might, as avowed at the bar, have prescribed a rate of wages, hours of work, or other conditions destructive of the profitable use of the corporate property.

"Such an exercise of legislative power can only be maintained on the ground that stockholders of corporations have no rights which the Legislature is bound to respect. Behind the artificial or ideal being created by the statute and called a corporation are the corporators—natural persons—

who have conveyed their property to the corporation, or contributed to it their money, and received as evidence of their interest shares in its capital stock. The corporation, though it holds the title, is the trustee, agent, and representative of the shareholders, who are real owners; and it seems to me that their right to use and enjoy their property is as secure under constitutional guaranties as are the rights of private persons to the property they may own.

"That the law in question, substantially and not merely theoretically, violates the constitutional rights of the owners of corporate property, can readily be shown. Already several corporations representing investments of great magnitude, submitting to its commands, have ceased their operations.

"It is probable that if the law be declared valid, many more will be forced to follow their example.

"It applies to all corporations formed under the laws of the State. If its provisions be enforced, a bank or a railroad company will lose the right to employ a Chinese interpreter to enable it to communicate with Chinese with whom it does business.

"A hospital association would be unable to employ a Chinese servant to make known, or minister to, the wants of a Chinese patient; and even a society for the conversion of the heathen would not be allowed to employ a Chinese convert to interpret the Gospel to Chinese neophytes." (6 Sawyer, 358.)

In keeping with this reasoning it was held by the Court that the constitutional and legislative provisions in question were repugnant to the Fourteenth Amendment and therefore void.

The case of *Detroit* vs. *Detroit and Howell Plank Road Company* (43 Mich., 140) is a strong case in support of the position I am endeavoring to maintain. The Legislature of Michigan, acting under this reserved power, passed an act requiring the company to remove its toll-gate without the limits of the city of Detroit. The effect was to deprive the company of two and a half miles of its road. The ques-

tion was whether that could be lawfully done under this reserved power. The Court held that it could not. The opinion of the Court was delivered by Mr. Justice Cooley, who, among other things, said:

"There is no well-considered case in which it has been held that a legislature, under its power to amend a charter, might take from the corporation any of its substantial property or property rights. In some cases the power has been denied where the interest involved seemed insignificant. The case of *Albany, etc., R. R. Co.* vs. *Brownell* (24 N. Y., 345,) is an illustration. It was there decided that, although the legislature might require railroad companies to suffer highways to cross their tracks, they could not subject the lands which the companies had acquired for other purposes to the same burden, except in connection with the provision for compensation. The decision was in accord with that in *Commonwealth* vs. *Essex Co.* (13 Gray, 239, 253) in which, while the power to alter, amend, or repeal the corporate franchises was sustained, it was at the same time declared that 'no amendment or alteration of the charter can take away the property or rights which have become vested under a legitimate exercise of the powers granted.' The same doctrine is clearly asserted in *Railroad Company* vs. *Maine* (96 U. S., 499), and is assumed to be unquestionable in the several opinions delivered in the Sinking Fund cases (99 U. S., 700).

"But for the provision of the Constitution of the United States which forbids impairing the obligation of contracts, the power to amend and repeal corporate charters would be ample without being expressly reserved. The reservation of the right leaves the State where any sovereignty would be if unrestrained by constitutional limitations and with the powers which it would then possess. It might, therefore, do what it would be admissible for any constitutional government to do when not thus restrained, but it could not do what would be inconsistent with constitutional principles. And it cannot be necessary at this day to enter upon a discussion in denial of the right of the Government to take from either individuals or corporations any property which they may rightfully have acquired. In the most arbitrary times such an act was recognized as pure tyranny,

and it has been forbidden in England ever since *Magna Charta*, and in this country always. It is immaterial in what way the property was lawfully acquired, whether by labor in the ordinary avocations of life, by gift or descent, or by making profitable use of a franchise granted by the State; it is enough that it has become private property, and it is then protected by the 'law of the land.'"

Such being the limits of this reserved power, it is clear that, even if it be held that the fourth section of Article XIII of the constitution of California, so far as it relates to railroad and other *quasi* public corporations, was adopted in the exercise of such power, it is nevertheless repugnant to the Fourteenth Amendment, and therefore void, if, as I have endeavored to show, corporatians and tax laws are within the operation of that provision.

I respectfully submit that the judgment should be affirmed.

S. W. SANDERSON.

APPENDIX.

ARGUMENT OF CREED HAYMOND.

The Central Pacific Railroad Company is One of the Means and Instrumentalities Selected and Employed by Congress to Carry into Operation the Powers Granted to the General Government. A Tax upon its Franchise, upon its Right to Exist, is, within the Meaning of all the Authorities, a Tax upon the Means and Instrumentalities of the General Government. Without the Express Consent of Congress No State Can Impose Such a Tax.

ACTS OF CONGRESS INVOLVED.*

On the first of July, 1862, Congress, in the exercise of powers that are not now questioned, passed "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes." (12 U. S. Stat., 489.)

The first section of the act names a number of persons, and declares that they, "together with five Commissioners, to be appointed by the Secretary of the Interior, and all persons who shall or may be associated with them and their successors, are hereby created and erected into a body corporate and politic, in deed and in law, by the

*The Acts of Congress involved in the various cases against the S. P. R. R. Co. are in all material respects substantially the same as the case herein considered, and they are cited in the answers of that company in the cases referred to.

name style, and title of the "Union Pacific Railroad Company." The company thus created is vested with the usual and customary powers of a corporation. The corporation is then expressly authorized to construct and maintain a railroad and telegraph line upon a given line between certain points named. The amount of the capital stock is next prescribed, and also certain rules and regulations for the government of the corporation, the management of its affairs, and the transaction of its business. Provision is also made for the election of a board of directors and *for the appointment of two additional directors by the President of the United States, to act as directors on the part of the Government.* The second section grants a right of way through the public lands, with the further right to take from the public lands adjacent to the line of the road materials of every description for the construction of the road, concluding with a promise on the part of the United States that the Indian titles to all lands falling under the operation of the act shall be extinguished as rapidly as may be. The third section grants to the company alternate sections of land, on each side of said road, with certain reservations as to mineral lands and lands reserved, or otherwise disposed of, or to which pre-emption or homestead claims have attached. The fourth section provides, among other things, for the appointment of three commissioners by the President, who are to examine the road from time to time, and to report to him as to the manner of its construction and the progress made therein, with a view to the issuing of patents for said lands, and that all vacancies occurring in said Board of Commissioners shall be filled by the President. The fifth section provides for the loaning of the credit of the Government, in the shape of bonds, and securing the payment thereof by a *first* lien upon the road and telegraph, together with all the rolling-stock and other property, and concludes with a provision which has a most important bearing upon the question in hand, viz: "And on the refusal or failure of said company to redeem said bonds, or any part of them, when required to do so by the Secretary of the Treasury, in accordance with the provisions of this act, *the said road, with all the rights, functions, immunities, and appurtenances thereunto belonging, and also all lands granted to the said company by the United States, which, at the time of said default, shall remain in the ownership of the said company,* MAY BE TAKEN POSSESSION

OF BY THE SECRETARY OF THE TREASURY, FOR THE USE AND BENEFIT OF THE UNITED STATES."

This provision is followed by another contained in the sixth section, which provides: "That the grants aforesaid are made upon condition that said Company shall *pay said bonds at maturity, and shall keep said railroad and telegraph lines in repair and use*, and shall at all times *transmit dispatches over said telegraph line, and transport mails, troops, and munitions of war, supplies, and public stores upon said railroad for the Government*, whenever required to do so by any Department thereof, *and that the Government shall at all times have the preference in the use of the same for all the purposes aforesaid.*" Power to consolidate with other companies named in the act is given in the sixteenth section. The right to connect with the road is given to other companies by the fifteenth section. The President is authorized to establish a uniform width of track, so that the same cars can be run from the Missouri river to the Pacific Ocean, by the twelfth section. The seventeenth section provides that if said company shall fail to comply with the terms and conditions of the act, or to keep the road in repair and use for an unreasonable time, "*Congress may pass any act to* insure the speedy completion of said roads and branches, or put the same in repair and use, and MAY DIRECT THE INCOME of said railroad and telegraph line to be thereafter devoted *to the use of the United States*," *etc.*; and further, that if said roads are not completed "*so as to form a continuous line from the Missouri river to the navigable waters of the Sacramento river*, by the first day of July, 1876, said road, with all their rolling stock, fixtures, etc., *shall be forfeited to and be taken possession of by the United States.*" The eighteenth section provides that when the net earnings of the road and telegraph shall have reached a certain per centum upon their cost, "Congress may *reduce the rate of fares thereon*, if unreasonable in amount, and *may fix and establish the same by law*, and may at any time, *having due regard for the rights of said companies* named herein, *add to, alter, amend*, or *repeal* this act." Finally, by the last section, the company is required to make annual reports as to certain matters therein mentioned to the Secretary of the Treasury, for the obvious purpose of enabling the General Government to supervise and control the road and telegraph by legislation and otherwise. (12 U. S. St. at Large, 489.)

The Pacific Railroad Acts Compared with the Act Establishing the Bank of the United States.

In respect to this question of taxation, and in respect to the Union Pacific Railroad Company, the act of Congress in question is upon all fours with the act by which the Bank of the United States was established (3 U. S. St. at Large, 266). The plan adopted by Congress for the purpose of establishing the bank and securing its use to the Government as a financial agent is so similar to that adopted in the present case as to suggest that the former served as a model for the latter. As, in this instance, a corporation, with full banking powers, was created. The amount of its capital stock was fixed at thirty-five millions of dollars, of which sum the Government was to subscribe only one-fifth, or seven millions, leaving twenty-eight millions to be taken by private individuals. The affairs of the bank were to be managed by twenty-five directors, of whom twenty were to be elected by the stockholders and five to be appointed by the President of the United States, by and with the advice and consent of the Senate. The powers of the directors and the business operations of the institution were defined and restricted. Power was given, with certain restrictions, to establish branch institutions in the several States. The Secretary of the Treasury was authorized to call upon the bank for a statement of its affairs as often as once a week. For the privileges and benefits conferred by the charter the president and directors of the bank were required to pay to the United States a bonus of one million and five hundred thousand dollars in three equal payments. And it was lastly provided that the books of the corporation should always be open to the inspection of a committee of either house of Congress appointed for that purpose.

Contrast these provisions with those of the railroad act, to which reference has been made, and it will appear that the interest of the Government in the bank was much less, and the powers over its management and affairs assumed by the Government was much less sovereign than in the case of the railroad. The interest of the Government in the bank was but five millions of dollars; to the Pacific railroad and telegraph it has loaned sixty-three millions in bonds, and has made extensive grants of lands. As the Government shared in the management of the bank, through directors appointed by the President, so does it share in the management of the Union Pacific

through the same means. As the Government was authorized to watch the operations of the bank, through committees of Congress, and reports by the directors of the bank to the Secretary of the Treasury, so has it watched the construction of the railroad and telegraph, through Commissioners appointed by the President, and so has it, and does it, inspect the management and affairs of the Pacific Railroad and telegraph, through annual reports made by the directors for a time to the Secretary of the Treasury, but latterly to the Secretary of the Interior. As the Government reserved the power to control the loans and business operations of the bank by legislation, so has it reserved the right to fix and establish by law *fares and freights* upon the Pacific Railroad. The authority asserted over the bank was, therefore, in no respect greater than that asserted over the railroad; on the contrary, the authority asserted over the railroad is far greater in a most important particular. Nowhere in the act by which the bank was established was any provision made for the forfeiture of its franchises, or for taking possession of its property by the Government and administering its affairs through other agencies, or the devotion of its income and resources to the use of the United States. Yet to the power to do all of these, which lie upon the extreme verge of governmental power, have been reserved by the Government in the case of the Pacific railroad and telegraph.

THE UNION PACIFIC RAILROAD COMPANY A NATIONAL CORPORATION.

It is clear that the Union Pacific Railroad Company is a national corporation, created for the benefit and use of the General Government, in the conduct and management of its postal, military, and other affairs, and it has been so decided. (*U. P. R. R. Co.* vs. *Myers*, Sup. C't U. S., May 4, 1885.) THE CENTRAL PACIFIC RAILROAD COMPANY bears substantially the same relation to the National Government as the Union Pacific Railroad Company. The relation of the Central Pacific to the General Government differs from that of the Union Pacific in one respect only. The Central Pacific was not in the first instance created a corporation by the General Government. It had become a corporation under the laws of the State of California prior to the passage of the Pacific railroad act, but its powers were confined to the State of California.

By the act of 1862 Congress conferred the same powers upon the Central Pacific which it conferred upon the Union Pacific, annexing thereto the same conditions. In the ninth section of the act it is provided that—

"The Central Pacific Railroad Company of California, a corporation existing under the laws of the State of California, is hereby authorized to construct a railroad and telegraph line from the Pacific coast, at or near San Francisco, or the navigable waters of the Sacramento, to the eastern boundary of California, *upon the terms and conditions, in all respects,* as are contained in this act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first-mentioned railroad and telegraph line on the eastern boundary of California."

Again, in the tenth section, it is further provided:

"And the Central Pacific Railroad Company of California, after completing its road across the State, is authorized to continue the construction of said railroad and telegraph through the Territories of the United States to the Missouri river, including the branch roads specified in this act, upon the routes hereinbefore and hereinafter indicated, *on the terms and conditions* provided in this act in relation to the said Union Pacific Railroad Company, until said roads shall meet and connect and the whole of said railroad and branches and telegraph is completed."

In section 16 of the act of Congress of July 2, 1864, it was provided that upon complying with certain conditions (all of which have been complied with) that the Central Pacific Railroad Company "shall enjoy all the rights, privileges, and benefits conferred by this act upon the Union Pacific Railroad Company."*

THE EXEMPTION CLAIMED.

It has been claimed on behalf of the Central Pacific Railroad Company—and with great plausibility—that by reason of the acts of Congress relating to it the General Government has converted it into a national corporation, and that in form as well as substance it bears the same relation to the Federal

*NOTE.—This admirable analysis of the acts of Congress relating to the Central Pacific Railroad Company is borrowed from Judge S. W. Sanderson. It has often since been used, both in arguments and opinions, without credit being given to its author.

Government and to the States as does the Union Pacific Company. It is also claimed that the State of California has assented to the adoption. That Congress had intended to and supposed it had erected the Central Pacific Railroad Company into a national corporation is evident. Section 17 of the act of 1862 provides in direct terms for a forfeiture to the United State for non-performance of conditions of the property and franchises of that corporation: "Conditions can only be reserved to the feoffer, donor, or lessor and their heirs, but not to a stranger." It would not be competent for Congress to provide for the forfeiture of the franchises of a State corporation to the National Government for non-performance of conditions nor to provide for the entry of the United States for such conditions broken, for "he who enters for conditions broken shall be in of the same estate he was before." *Wiseman* vs. *McNulty*, 25 Cal., 239.

But whether it be true or not that the Central Pacific Railroad Company has in form been made a Federal corporation I shall not, at this point, stop to inquire. The question whether it is or is not a Federal corporation is of minor importance. Corporation or no corporation is not a factor in the solution of the problem.

THE CENTRAL PACIFIC RAILROAD COMPANY IS AN INSTRUMENT OF THE GENERAL GOVERNMENT.

By the unquestioned act of Congress the Central Pacific Railroad Company has been selected as a means and instrument of the General Government to carry into execution the admitted powers of that government. It was authorized to construct and operate a railroad and telegraph line upon the same "terms and conditions in all respects" as the Union Pacific.

These "terms and conditions" constitute the test whether or not it has been made an instrument of the General Government. It is useless at this point to speculate upon the reasons which led to the enactment of the law of 1862, or what were the purposes had in view, for Congress has declared the reason and purpose in the title of the act to be to "secure to the Government the use" of a railroad from the Missouri River to the Pacific Ocean, "for postal, military, and other purposes." To effectuate that purpose Congress created a corporation known as the Union Pacific Railroad Company, and adopted the Central Pacific Railroad Company, and to

these corporations, upon the same terms and conditions, intrusted the execution of its purposes. The two companies were charged by Congress with the speedy construction of the road and telegraph line. It was made their duty, when completed, to keep the same in repair and use, so that upon demand of the Government they could transmit its dispatches over the telegraph line and transport its mails, troops, munitions of war, supplies, and public stores upon the railroad. To the end that these companies might be in condition to perform these great governmental functions, aids in lands were given, and bonds were loaned. That the Pacific Railroad Co's might maintain and operate the vast machine intrusted to their care, and be ready at all times to give to the Government its aid in peace and in war, without too great a charge upon the public treasury, they were authorized to transact business for private parties, but were required at all times to subordinate such business to the public duties cast upon them. The Government "must at all times have the preference." At all times both companies are subject to the orders of the General Government, and must, at its command, devote themselves to the performance of their governmental functions to the absolute exclusion of all other business. Not more absolute is the control of the General Government over the officer who commands its steam frigates than is its control over the agents who constructed and who manage the trans-continental roads. The Government may, for the purposes of his creation, control every public and official action of a captain in the navy. All this may it do with these corporations; it has assumed to do more—to control their relations with private parties and regulate the terms and conditions upon which they can transact their private affairs. Congress has employed these corporations as a means to carry its powers into execution. Can the State governments destroy either? This is one of the questions upon the solution of which depends the validity or invalidity of the State tax sought to be imposed upon the franchise, or the right to exist, of the Central Pacific Railroad Company.

THE POWER TO SELECT IMPLIES THE POWER TO PRESERVE.

The power to create implies the power to preserve. The power to destroy, if wielded by a different hand, is hostile to

and incompatible with the power to create and preserve. Where that repugnance exists, that authority which is supreme must control, not yield to that over which it is supreme. "These propositions, as abstract truths," says Chief Justice Marshall (4 Wheat., 426), "would, perhaps, never be controverted."

Are these propositions applicable to the case in hand? Let us consider them separately, and in the order of inquiry the first will be:

HAD CONGRESS THE POWER TO SELECT THE CENTRAL PACIFIC RAILROAD COMPANY AND CREATE IT AN AGENT OF THE GENERAL GOVERNMENT—TO MAKE IT ONE OF THE MEANS OR INSTRUMENTS FOR THE CONSTRUCTION OF A TRANS-CONTINENTAL RAILWAY AND TELEGRAPH, AND ONE OF THE MEANS OR INSTRUMENTALITIES BY WHICH THE USE OF THE SAME FOR POSTAL, MILITARY, AND OTHER PURPOSES COULD BE SECURED TO THE GOVERNMENT?

At this late date no argument would seem to be necessary to maintain the proposition that Congress possesses such powers. The Federal Constitution expressly confers upon Congress the power, among others, to provide for the common defense and general welfare of the United States; to establish post-roads; to declare and carry on war, and to make all laws which shall be necessary and proper for carrying into execution the powers granted. With respect to the means by which the powers it confers are to be executed, the Constitution has been construed to allow Congress that discretion which will enable it to perform the high duties assigned in the manner most beneficial. After Congress has acted it is not for the courts to determine whether the means selected are the best possible. Such considerations are for Congress alone. If the end be legitimate; if it be within the scope of the Constitution, then all means which are plainly adapted to that end, whether better ones could be found or not, may be constitutionally used by Congress.

McCulloch vs. *Maryland*, 4 Wheaton, 421.

We have seen that the declared purpose of Congress in providing for the construction of the trans-continental railway and telegraph was to "promote the public interest and

welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes." Was the end a legitimate one? Was it within the scope of the Constitution? In the progress of science railways have become mighty engines in the prosecution of military enterprises. Indeed, their use may be said to have almost revolutionized the art of war. Not only are they proper means if the end be war, but they are admittedly necessary means without which no civilized nation would attempt to carry on warfare with another. This being so, then Congress would have the right to construct and to maintain them to subserve the public welfare. The power to construct and maintain necessarily includes the power to determine the mode and means of construction and maintenance and to select the instruments to keep the same in working order. In making this determination Congress created a corporation to construct and maintain the eastern section, and adopted a corporation already in existence to construct and maintain the western section. As to both sections the object of Congress was the same. To authorize some person to construct the road and to impose upon the persons authorized the duty of keeping it in repair and use, so that, whenever required, the "mails, troops, and munitions of war" of the Government could be transported over it, and, if necessary, to the exclusion of all other traffic. This was the great purpose and object of the Government, and in this purpose and object Congress found the constitutional authority to act in the premises. The end was not to create one corporation nor to adopt another, but was to create agents, or instrumentalities and means through which the governmental function involved could be exercised. It created one *corporation* and made it such an instrument or agent. It found another corporation in existence and made it the means by which the power should, in part, be executed. Congress seized upon a State corporation and made it the instrument to execute its will. Congress by law gave it the right of way over the public lands; the right to contract debts and secure them by mortgage; the right to take and hold property; the right to build railroads in the Territories of the United States; the right to make contracts; the right to main-

tain ferries over navigable waters; the right to consolidate with other corporations, and to adopt and use thereafter a corporate name, and to enjoy all the rights, privileges, and benefits conferred upon the Union Pacific. Congress, by law, made it the duty of the Central Pacific Railroad Company to keep the road and telegraph in repair and use; to transmit on demand, dispatches, mails, troops, and munitions of war for the Government, and reserved the right to regulate freights and fares—to enter for condition broken, and to alter, amend, and repeal. These rights, privileges, powers, and duties, conferred and imposed, make the instrument to bear a wonderful resemblance to a Federal corporation. In these times courts deal more with substance and less with form in construing laws, and when we remember that no particular form of words or mode of expression is necessary to the creation of a corporation, it is difficult to conceive that Congress intended less than the creation of a Federal corporation. But it is not the name which the instrument bears, but the faculties with which it is endowed and the purposes for which it is used, which gives it immunity. All the rights and privileges above enumerated, all the rights and privileges which the Union Pacific enjoys, are conferred upon the Central Pacific by the Federal Government. That the Central Pacific Railroad Company is an agent of the Government precisely as the Union Pacific Company is, to the same extent, and for the same purposes, is not an open question. Such is the judgment of the Supreme Court of the United States.

(*Railroad* vs. *Company Peniston*, 18 Wallace, 32.)

THE STATE CANNOT DESTROY THE AGENT SELECTED.

No one has ever seriously questioned the power of Congress to enact the laws in question, and we may safely assume that Congress, "to promote the public interest and welfare * * * to secure to the Government at all times the use and benefit of the trans-continental road and telegraph," had the right to select the Central Pacific Railroad Company as an instrument—clothe it with the privileges and immunities given by law, and place it in charge of the western section of that road and telegraph line. Can the State destroy this agent? No one would have the temerity to contend that a State could repeal the laws which give to

the Central Pacific its character as a national agent. Whatever Congress has the power to do the individual States have no right to undo. Its power to select an agent and place it in charge of the machinery of war, like its other leading governmental powers, is supreme or it would be nothing. As Mr. Pinckney aptly remarks (4 Wheat., 391): "A power to build up what another may pull down at pleasure is a power which can provoke a smile, but which can do nothing else." If the State cannot repeal the acts of Congress under which this corporation now exercises all its functions, it cannot by indirection accomplish the same purpose. This agent chosen by the Federal Government must continue to exist, enjoy its privileges and immunities, and perform its obligations so long as that government wills. A constitutional law enacted by Congress to carry into execution the powers vested in the General Government confers the privileges and immunities, and imposes the obligations, and no State can in any manner retard, impede, burden or control the operation of that law. (*McCulloch* vs. *Maryland*, 4 Wheat., 316; *Osborn* vs. *Bank of United States*, 9 Wheat., 738; *Weston* vs. *City of Charleston*, 2 Peters, 466.) This, says Chief Justice Marshall (4 Wheat., 436), is "the unavoidable consequence of that supremacy which the Constitution has declared." And again (p. 425): "A law absolutely repugnant to another as entirely repeals that other as if express terms of repeal were used."

THE POWER TO TAX IS THE POWER TO DESTROY.

The power of the State to tax the franchise—the right to exist—of the Central Pacific Railroad Company is incompatible with the power of the Federal Government to adopt and use it as a governmental agent or instrument.

THE EARLIEST ADJUDICATIONS UPON THE SUBJECT BY THE SUPREME COURT OF THE UNITED STATES.

In expounding the relations which the means, instruments, and agencies of the General Government bear to the States, "a splendor of eloquence and strength of argument seldom, if ever, surpassed," has been supplemented by judgments pronounced by the most illustrious of the line of great judges who have adorned the American bench. In the investigation before us there are no strange waters to be

traversed nor new lands to be explored. The courses have been laid, the paths marked, and if we but pursue them no mistake can be made.

In *McCulloch* vs. *Maryland* (4 Wheaton, 400), the defendant in error, the State of Maryland, denied the obligation of the law enacted by the Legislature of the Union creating the Bank of the United States, and the plaintiff in error on his part contested the validity of an act which had been passed by the Legislature of Maryland, taxing the operations of the bank. The first question made in the cause was: Has Congress power to incorporate a bank? This question the court answered in the affirmative. In discussing the question the nature of the General Government was inquired into, the conflicting powers of it and the State governments were brought, into view, and the supremacy of their respective laws, when they are in operation, settled, and it was substantially held:

1. That the General Government emanates from and its powers were granted by the people; that though its powers are limited it is supreme within its sphere of action, and its laws, when made in the pursuance of the Constitution, form the supreme law of the land.

2. That there is nothing in the Constitution of the United States which excludes the use of incidental or implied powers. That if the end be legitimate and within the scope of the Constitution all the means which are appropriate, which are plainly adapted to that end, and which are not prohibited, may be employed to carry it into effect.

3. That the power to establish a corporation is not a distinct governmental power, but only the means of carrying into effect other powers.

4. That Congress in carrying into effect any of the powers expressly given by the Constitution is the sole judge of the mode and manner and means by which such power may be executed, and of the propriety and necessity thereof. The question is one of legislative construction and not of judicial cognizance.

The power to create a corporation as a substantive independent power does not exist in the General Government. But the Government having the right to do an act, and having the duty imposed upon it of performing that act, must, "according to the dictates of reason, be allowed to select the means." In the exercise of the right of selection,

it may seize upon any means already in existence and reasonably adapted to the purpose; and if no such means are in existence, or the means already in existence are not in the judgment of Congress the best to the end, then it may bring into existence that artificial being commonly known as a corporation, and make it an instrument through which the powers of government are to be exercised. It was not the fact that the General Government created a banking corporation which constituted that corporation a governmental agency. The creation of the corporation was a mere incident,—the exercise of a power incident to the right of selection. It was the fact that Congress by law had endowed it with certain faculties relative to the fiscal operations of the Government, which threw around it the protection of that Government and shielded it from hostile legislation at the hands of another. Nor is this mere matter of deduction or inference from the opinions of the Court. Chief Justice Marshall declares this to be so. "We do not," said the Chief Justice, "maintain that the corporate character of the bank exempts its operations from the action of State authorities. If an individual were to be endowed with the same faculties, for the same purposes, he would be equally protected in the exercise of those faculties." *Osborn* vs. *U. S. Bank*, 9 Wheat., 362–3.

The second question made in *McCulloch* vs. *Maryland* (4 Wheat., 425) was whether the State of Maryland might, without violating the Constitution, tax the branch of the United States Bank established in that State?

Counsel for the bank placed its claim to be exempted from the power of a State to tax its operations upon the paramount character of the Federal Constitution. On the part of the State it was contended not that the States may directly resist a law of Congress, but that they may exercise their acknowledged powers upon it, and that the Federal Constitution leaves them this right, in the confidence that it will not be abused. In examining these positions and subjecting them to the test of the Constitution, the Chief Justice, speaking for the Court, says:

"We must be permitted to bestow a few considerations on the nature and extent of this original right of taxation, which is acknowledged to remain with the States. * * * It is admitted that the power of taxing the people and their property is essential to the very existence of the Government, and

may be legitimately exercised on the objects to which it is applicable to the utmost extent to which the Government may choose to carry it. The only security against the abuse of this power is found in the structure of the Government itself. In imposing a tax the Legislature acts upon its constituents. This is, in general, security against erroneous and oppressive taxation. * * * The people of a State, therefore, give to their Government a right of taxing themselves and their property, and as the exigencies of a government cannot be limited, they prescribe no limits to the exercise of this right, resting confidently on the interest of the legislator and on the influence of the constituents over their representatives to guard them against its abuse; but the MEANS employed by the Government of the Union have no security, nor is the right of a State to tax them sustained by the same theory. * * * Those means are not given by the people of a particular State, nor given by the constituents of the Legislature, which claims the right to tax them, but by the people of all the States. They are given by all for the benefit of all, and upon theory should be subjected to that government only which belongs to all." (Pp. 428, 429.) Again, the Court say: "There is no express provision for the case, but the claim (the claim of counsel of bank to be exempted from the power of the State to tax its operations) has been sustained on a principle which so entirely pervades the Constitution, is so intermixed with the materials which compose it, so interwoven with its web, so blended with its texture, as to be incapable of being separated from it without rending it into shreds. This great principle is that the Constitution and the laws made in pursuance thereof are supreme; that they control the constitution and laws of the respective States, and cannot be controlled by them." (P. 426.) Again: "That the power of taxing it (the bank) by States may be exercised so as to destroy it, is too obvious to be denied; but taxation is said to be an absolute power which acknowledges no other limits than those expressly prescribed in the Constitution, and, like sovereign power of every other description, is trusted to the discretion of those who use it; but the very terms of this argument admit that the sovereignty of the State in the article of taxation itself is subordinate to and may be controlled by the Constitution of the United States. How far it has been controlled by that instrument must be a ques-

tion of construction. In making this construction no principle not declared can be admissible which would defeat the legitimate operations of a supreme government. It is of the very essence of supremacy to remove all obstacles to its action in its own sphere, and so to modify every power vested in subordinate governments as to exempt its own operations from their own influence. This effect need not be stated in terms; it is so involved in the declaration of supremacy—so necessarily implied—that expressions of it could not make it more certain." (Id., p. 427.)

To give effect to this supremacy the court construes the Federal Constitution as placing beyond the reach of the State all the powers which are conferred by the people of the United States on the Government of the Union, and all of the means which are selected for the purpose of carrying those powers into execution. It maintains that by so doing relief is had from clashing sovereignty and from interfering powers, "from a repugnancy between a right in one government to pull down what there is an acknowledged right in another to build up—from the incompatibility of a right in one government to destroy what there is a right in another to preserve. We are not driven to the perplexing inquiry so unfitted for the judicial department, what degree of taxation is the legitimate use, and what degree may amount to an abuse of the power. An attempt to use it (the taxing power) on the means employed by the Government of the Union in pursuance of the Constitution is itself an abuse, because it is a usurpation of a power which the people of a single State cannot give." Again say the Court: "We find, then, on a just theory, a total failure of this original right to tax the means employed by the Government of the Union for the execution of its powers. The right never existed, and the question whether it has been surrendered cannot arise." (P. 430.)

Still pursuing the subject, the Court asserts: "That the power to tax involves the power to destroy; that the power to destroy may defeat and render useless the power to create; that there is a plain repugnance in conferring on one government a power to control the constitutional measures of another, which other, with respect to those very measures, is declared to be supreme over that which exerts the control, are propositions not to be denied. * * * The Legislature of the Union alone, therefore, can be trusted by the people

with the power of controlling measures which concern all, in the confidence that it will not be abused. * * * The question is, in truth, a question of supremacy; and if the right of the State to tax the means employed by the General Government be conceded, the declaration that the Constitution, and the laws made in pursuance thereof, shall be the supreme law of the land, is an empty and unmeaning declamation." The judges were unanimous in the conclusion "that the States have no power, by taxation or otherwise, TO RETARD, IMPEDE, BURDEN, or in any manner control the operation of the constitutional laws enacted by Congress to carry into execution the powers vested in the General Government." (P. 436.)

In *McCulloch* vs. *Maryland* the tax involved was a stamp tax sought to be imposed by the State of Maryland upon the paper upon which the notes of the bank were printed. The tax was held unconstitutional upon the ground that it was "a tax on the operation of an instrument EMPLOYED by the Government of the Union to carry its powers into execution." (P. 437.) It was not unconstitutional because it imposed a tax upon the operations of a Federal corporation, but because it imposed a tax upon "an instrument employed by the Government." The test of immunity was not the corporate character, but the purpose for which it was used by the General Government.

The next case in order of time is that of *Osborn* vs. *U. S. Bank* (9 Wheaton, 738.) The State tax, the validity of which was attempted to be maintained in *Osborn* vs. *U. S. Bank*, was a tax laid by the Legislature of Ohio upon the right of the branch banks to do business in that State. It seems to have been conceded by counsel for the plaintiff in error, the party maintaining the validity of the tax, that the Government had the right to preserve the bank as its agent or instrument; but a distinction was sought to be made between the tax in question—a tax upon the business of the bank—and a tax levied upon the corporate franchise or right of the agent to exist. The court held that no such distinction existed. "That to tax its faculties, its trade, and occupation is to tax the bank itself; to destroy or preserve the one is to destroy or preserve the other." (P. 862.) At this point in the argument we desire to bring into prominence the fact that in *Osborn* vs. *U. S. Bank* it was held that there was no distinction between a tax upon the right of the instrument to exist

and a tax upon the operations of the instrument, and that, this being so, all that was said in *McCulloch* vs. *Maryland*, relative to the power of a State to tax the operations of a governmental agent, applies with equal force when the right to tax the existence of the agent is in question.

In their order, the next case is that of *Weston* vs. *The City of Charleston*, 2 Peters, 449. This case arose out of an attempt on the part of the city of Charleston to levy a tax of 25 cents upon every $100 of the 6 and 7 per cent. stock of the United States owned and possessed within the limits of that city. The Court, Chief Justice Marshall rendering the decision, held the case within the principle settled in *McCulloch* vs. *The State of Maryland*, and reaffirmed the opinion in that case. In the argument it was not denied that the States could not tax any of the instruments or means used by the General Government in the execution of its powers. (P. 479.) But it was contended that only such taxes as were directly laid upon the means or instrument fell within the inhibition of the Federal Constitution. In answer to this argument, the Court said that any law directly obstructing the operation of a constitutional act of Congress, or hindering, impeding, or burdening its operation was admittedly void, and that no distinction could be taken between direct opposition and those measures which may consequently affect the means.

After many years had elapsed, and when the great lawyers and judges who had participated in the discussions and decisions before referred to were resting in honored graves, another generation of judges and lawyers came to the consideration of the grave question involved. The Legislature of the State of Pennsylvania passed a law which authorized the assessment of a State and county tax upon "all offices and posts of profit." One Daniel Dobbins, a citizen and resident of the State of Pennsylvania, a captain in the revenue cutter service of the United States, commanding the revenue cutter "Erie," on the Erie station, was assessed under this act upon the office which he held. He resisted the payment of the tax. Suit was brought in the State courts to inforce it, and judgment was finally rendered by the supreme court of Pennsylvania sustaining the tax. Capt. Dobbins brought the case to the Supreme Court of the United States by a writ of error. (*Dobbins* vs. *The Commissioners of Erie County*, 16 Peters, 435.)

In the Supreme Court of the United States, counsel for the defendant in error admitted that a State tax upon the hull and apparel of the revenue cutter commanded by Capt. Dobbins would have been unconstitutional for the reason that the cutter "was the 'means' or 'instrument'" of the Government. (Counsel might also have placed his admission upon another ground, *i. e.*, that the cutter was the property of the United States.) But he maintained that the tax by the State was not of such instrument, but of ONE OF HER CITIZENS, whose income was rated to fix the amount of his contribution to the public burden. The Court, after clearing the case of objections which did not relate to the unconstitutionality of the tax, proceeded to discuss the question "whether the plaintiff is liable to be rated and assessed for his office under the United States for county rates and levies?"

Say the Court (p. 447):

"Taxation is a sacred right, essential to the existence of government and the incident of sovereignty. The right of legislation is coextensive with the incident, to attach it upon the persons and property within the jurisdiction of a State, but in our system there are limitations upon that right. There is a concurrent right of legislation in the State and the United States, except as both are restained by the Constitution of the United States; both are restrained upon this subject by express prohibitions in the Constitution, and the States by such as are necessarily implied when the exercise of a right by the State conflicts with the perfect execution of another sovereign power delegated to the United States. THAT OCCURS WHEN TAXATION BY A STATE ACTS UPON THE INSTRUMENTS, EMOLUMENTS, AND PERSONS WHICH THE UNITED STATES MAY USE AND EMPLOY AS NECESSARY AND PROPER MEANS TO EXECUTE THEIR SOVEREIGN POWER * * * Congress has power to lay and collect taxes, duties, imposts, etc., and to regulate commerce with foreign States and among the sovereign States, and with the Indian tribes. Neither can be done without legislation."

The Court held that to do either a complicated machinery of forms, instruments, and persons must be established, and that laws to these ends constitute legislation by Congress in execution of sovereign powers. "They are the means necessary to the allowed end—the end, the great objects which

the Constitution was intended to secure to the States in their character as a nation." (P. 448.)

In applying the principles stated to the case in judgment the Court say: "Is the officer, as such, less a means to carry into effect these great objects than the vessel which he commands, the instruments which are used to navigate her, or the guns put on board to enforce obedience to the law? These inanimate objects, it is admitted, cannot be taxed by a State, because they are means. Is not the officer more so who gives use and efficacy to the whole?" (P. 448.)

"The unconstitutionality of the tax in question," said the Court, "might be safely put—though it is not the only ground—upon its interference with constitutional means which have been legislated by the Government of the United States to carry into effect its powers to lay and collect duties, taxes, imposts, etc., and to regulate commerce. In our view it presents a case of as strong interference as was presented by the tax imposed by Maryland in the case of McCulloch, 4 Wheaton, 316, and the tax of the City Council of Charleston in Weston's case, 2 Peters, 449, in both of which it was decided by this Court that a State cannot lay a tax upon the constitutional means employed by the Government of the Union to execute its constitutional powers." (429.)

The other ground upon which the Supreme Court of the United States held that the immnnity might be tested was the exemption of the salaries of all officers of the United States from taxation by the States; but the main ground upon which it held it might safely be placed was that of INTERFERENCE BY THE STATES WITH THE MEANS EMPLOYED BY THE GOVERNMENT OF THE UNION TO EXECUTE ITS POWERS. Bearing this proposition steadily in view, let us now consider whether, if Congress, instead of constructing the revenue cutter "Erie" in a navy-yard of the United States, had seen proper by law to authorize Capt. Dobbins to construct it, and had loaned him the money of the Government to aid in such construction, and had taken a mortgage upon the vessel to secure that loan, and had authorized Capt. Dobbins to use the vessel in part in private business, reserving the right to control that business to a certain extent, but requiring him at all times to hold himself and the vessel to which he held the legal title in readiness to execute the orders of the Government relating to the revenue service upon Lake Erie, and let us further suppose that Congress, instead of

fixing his compensation, had allowed him to receive it from the private business in which he was engaged. In this event would the relation of Captain Dobbins, or of his ship, toward the National Government have been changed? The relation of the ship in one respect would have been changed, for the Government, instead of holding the legal title to it, would only hold a mortgage upon it.

Whether it still bore to the Government such a relation of means to an end as to exempt it from State taxation is a grave and serious question, upon which it will be seen during the course of this argument the Supreme Court of the United States has been almost evenly divided, but granting, for the purposes of the argument, that in both respects the relation of the vessel to the United States would be changed, yet it is clear that the relation of Capt. Dobbins would remain the same. To prove that this is so, we refer again to *Osborn* vs. *U. S. Bank*, 9 Wheaton, 863, where it is said:

"We do not maintain that the corporate character of the bank exempts its operations from the action of State authority. If an individual were to be endowed with the same faculties, for the same purpose, he would be equally protected in the exercise of those faculties.

"The operations of the bank are believed not only to yield the compensation for its services to the Government, but to be essential to the performance of these services. * * * The business of the bank constitutes its capacity to perform its functions as a machine for the money transactions of the Government. Its corporate character is merely an accident which enables it to transact that business more beneficially.

"Were the Secretary of the Treasury to be authorized by law to appoint agencies throughout the Union to perform the public functions of the bank, and to be endowed with its faculties as a necessary auxiliary to those functions, the operations of those agents would be as exempt from the control of the States as the bank, and not more so. If, instead of the Secretary of the Treasury, a distinct office were to be created for the purpose, filled by a person who should receive, as a compensation for his time, labor, and expense, the profits of the banking business instead of other emolument, to be drawn from the treasury, which banking business was essential to the operation of the Government, would

each State in the Union possess a right to control their operations?

"The question on which this right would depend must always be: Are these faculties so essential to the fiscal operation of the Government as to authorize Congress to confer them? Let this be admitted, and the question: Does the right to preserve them exist? must always be answered in the affirmative." (863, 864.)

It having been authoritatively determined in *Osborn* vs. *The U. S. Bank* that, so far as immunity was concerned, there was no distinction between a tax upon the means or agent and a tax upon the operations of the means and the agent—that one was the equivalent of the other—therefore, upon the authority of that case, and upon the case of *Dobbins* vs. *The Commissioners*, it may be safely asserted that the relation of Capt. Dobbins to the United States would remain unchanged, although the vessel which he commanded was his own private property, and not within the immunity.

Then, how stands the case of the Central Pacific Railroad Company, assuming it to be, strictly speaking, a State corporation only? It is a citizen and resident of the State of California, as Capt. Dobbins was a citizen and resident of the State of Pennsylvania. The Congress of the United States has seized upon it as a means to execute the war power of the National Government, as Congress selected Capt. Dobbins as a means to execute the revenue power. Congress has placed it in charge of a national work, originating in national necessities, and having as its end the promotion of the welfare of the whole country.

In each case the primary object of the Government was to advance its own interests—in the one to secure a vessel, and in the other to secure a road which could be used for national purposes. In both, the person who commands and controls, who gives effect to this Congressional intent, is an agent or means to the end, and must be within the protection of the Federal Government, or the purposes and intent of that Government would be at the mercy of hostile legislation at the hand of the States.

JUDGMENT OF WAR.

Two generations of judges had pronounced the existence of implied powers and the supremacy of the National Government over the means and agents by which its powers

were to be executed. These questions, upon which statesmen had divided, and upon which parties had from the beginning been formed, were now at rest, so far as rest could be attained through the instrumentality of a court sitting in peaceful judgment upon the Constitution. When next they were agitated, it was in a forum in which the eloquent persuasions of the advocate gave place to the stern commands of the soldier, and the clash of arms was the substitute for the reason of the judges. The last appeal of mankind was taken, and the controversy in the field was marked upon each side with the same pertinacity and ability which characterized its progress in peaceful court and council. Although the valor of our race gave luster to a mistaken and lost cause, the judgment of peace was affirmed in the forum of war.

THE TRANS-CONTINENTAL ROADS WERE BORN OF WAR.

The trans-continental road, dedicated now chiefly to the promotion of the peaceful arts, was born in war. It is true that a few of the prominent men of the nation had long looked forward to such a work, and that the people of California, forming an isolated community, had as early as May 1, 1852, through their Legislature, declared "that the interests of this State, as well as those of the whole Union, require the immediate action of the Government of the United States for the construction of a national thoroughfare connecting the navigable waters of the Atlantic and Pacific Oceans, for the *purposes of national safety in the event of war*, and to promote the highest commercial interests of the Republic," AND GRANTED THE RIGHT OF WAY THROUGH THE STATE TO THE UNITED STATES FOR THE PURPOSE OF CONSTRUCTING SUCH A ROAD. (Statutes California, 1852, p. 150.) Again, in 1859 the Legislature passed a resolution calling a convention "to consider the refusal of Congress to take efficient measures for the construction of a railroad from the Atlantic States to the Pacific, and to adopt measures whereby the building of said road can be accomplished." (Statutes Cal., 1859, 391.) And at the same session the Legislature memorialized Congress to pass a law *authorizing the construction* of such a road, and asking that lands be granted in aid thereof. (Statutes 1859, p. 395.) These various measures of the State of California are referred to to show that, in the judgment

of the State, the work was a proper one for the Federal Government and national in its character; but nothing came of these acts and resolves. It was only when war, in fact, was at hand that the National Government moved in the premises.

THE WORK A NATIONAL ONE.

We have seen that the State of California had uniformly characterized the work as a national one; that Congress declared the purpose of the act of 1862 to be "to promote the public welfare by the construction of said railroad and telegraph line and keeping the same in working order, and to secure to the Government at all times, but particularly in time of war, the use and benefit of the same for postal and military and other purposes." (Sec. 18, act of 1862.) Here, then, we have the declaration of the legislative department of both State and Federal Government that the paramount purpose of the road is a national one, and that the means by which it was to be constructed and used were national means.

JUDICIAL CONSTRUCTION.

We come now to consider how the judicial department of the Federal Government has construed the Pacific railroad acts and what that department has said upon the question—whether the transcontinental road is a national machine and the persons in charge of it agents of the Federal Government to carry into execution its lawful purposes—whether or not such persons have been selected by the General Government as means to the ends sought to be attained by the Pacific railroad acts. In *United States* vs. *Union Pacific R. R. Co.*, 91 U. S., 79, the court say:

"In construing an act of Congress we are not at liberty to recur to the views of individual members in debate, nor to consider the motives which influenced them to vote for or against its passage. The act itself speaks the will of Congress, and this is to be ascertained from the language used. But courts, in construing a statute, may with propriety recur to the history of the times when it was passed; and this is frequently necessary, in order to ascertain the reason as well as the meaning of particular provisions in it. (*Aldridge* vs. *Williams*, 3 How., 24; *Preston* vs. *Browder*, 1 Wheat., 120.)

"Many of the provisions in the original act of 1862 are outside of the usual course of legislative action concerning

grants to railroads, and cannot be properly construed without reference to the circumstances which existed when it was passed. The war of the rebellion was in progress; and, owing to complications with England, the country had become alarmed for the safety of our Pacific possessions. The loss of them was feared in case those complications should result in an open rupture; but even if this fear were groundless, it was quite apparent that we were unable to furnish that degree of protection to the people occupying them which every government owes to its citizens. It is true that the threatened danger was happily averted; but wisdom pointed out the necessity of making suitable provisions for the future. This could be done in no better way than by the construction of a railroad across the continent. Such a road would bind together the widely separated parts of our common country, and furnish a cheap and expeditious mode for the transportation of troops and supplies. If it did nothing more than afford the required protection to the Pacific States, it was felt that the Government, in the performance of an imperative duty, could not justly withhold the aid necessary to build it; and so strong and pervading was this opinion that it is by no means certain that the people would not have justified Congress if it departed from the then settled policy of the country regarding works of internal improvement, and charged the Government itself with the direct execution of the enterprise.

"This enterprise was viewed as a national undertaking for national purposes; and the public mind was directed to the end in view, rather than to the particular means of securing it. Although this road was a military necessity, there were other reasons active at the time in producing an opinion for its completion besides the protection of an exposed frontier. There was a vast unpeopled territory lying between the Missouri and Sacramento rivers which was practically worthless without the facilities afforded by a railroad for the transportation of persons and property. With its construction the agricultural and mineral resources of this territory could be developed, settlements made where settlements were possible, and thereby the wealth and power of the United States largely increased; and there was also the pressing want, in time of peace even, of an improved and cheaper method for the trans-

portation of the mails, and of supplies for the army and the Indians.

"It was in the presence of these facts that Congress undertook to deal with the subject of this railroad. The difficulties in the way of building it were great, and by many intelligent persons considered insurmountable.

"Although a free pleople, when resolved upon a course of action, can accomplish great results, the scheme of building a railroad two thousand miles in length, over deserts, across mountains, and through a country inhabited by Indians jealous of intrusion upon their rights, was universally regarded at the time as a bold and hazardous undertaking. It is nothing to the purpose that the apprehended difficulties in a great measure disappeared after trial, and that the road was constructed at less cost of time and money than had been considered possible. No argument can be drawn from the wisdom that comes after the fact. Congress acted with reference to a state of things believed at the time to exist; and, in interpreting its legislation, no aid can be derived from subsequent events. The project of building the road was not conceived for private ends; and the prevalent opinion was that it could not be worked out by private capital alone. It was a national work, originating in national necessities and requiring national assistance.

"The policy of the country, to say nothing of the supposed want of constitutional power, stood in the way of the United States taking the work into its own hands. Even if this were not so, reasons of economy suggested that it were better to enlist private capital and enterprise in the project by offering the requisite inducements. Congress undertook to do this, in order to promote the construction and operation of a work deemed essential to the security of great public interests.

"It is true, the scheme contemplated profit to individuals, for without a reasonable expectation of this capital could not be obtained, nor the requisite skill and enterprise. But this consideration does not in itself change the relation of the parties to this suit. This might have been so if the Government had incorporated a company to advance private interests, and agreed to aid it on account of the supposed incidental advantages which the public would derive from the completion of the projected railway. But the primary object of the Government was to advance its own interests, and

it endeavored to engage individual co-operation as a means to an end—the securing a road which could be used for its own purposes. The obligations, therefore, which were imposed on the company incorporated to build it, must depend on the true meaning of the enactment itself, viewed in the light of contemporaneous history.

"It has been observed by this Court that the title of an act, especially in Congressional legislation, furnishes little aid in the construction of it, because the body of the act in so many cases has no reference to the matter specified in the title. (*Hadden* vs. *The Collector*, 5 Wall., 110.) This is true, and we have no disposition to depart from this rule. But the title even of the original act of 1862, incorporating the appellee, seems to have been the subject of special consideration, for it truly discloses the general purpose of Congress in passing it. It is 'An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the Government the use of the same for postal, military, and other purposes.' That there should, however, be no doubt of the national character of the contemplated work, the body of the act contains these significant words: 'And the better to accomplish the object of this act—namely, to promote the public interest and welfare by the construction of said railroad and telegraph line, and keeping the same in working order, and to secure to the Government at all times (but particularly in time of war) the use and benefits of the same for postal, military, and other purposes—Congress may at any time, having due regard for the rights of said companies named herein, add to, alter, amend, or repeal this act.' (12 Stat., p. 497.) Indeed, the whole act contains unmistakable evidence that if Congress was put to the necessity of carrying on a great public enterprise by the instrumentality of private corporations, it took care that there should be no misunderstanding about the objects to be attained, or the motives which influenced its action.

"If it had been equally explicit in the provision regarding the bonds to be issued in aid of the company there would have been no occasion for this suit. But even in this particular, looking to the motives which prompted the act and to the objects intended to be effected by it, we do not think there is any serious difficulty in getting at the true meaning of Congress. The act itself was an experiment.

It must be considered in the nature of a proposal to enterprising men to engage in the work; for, with the untried obstacles in the way, there was no certainty that capital could be enlisted. If enlisted at all, it could only be on conditions which would insure, in case of success, remuneration proportionate to the risk incurred."

The object was "protection to the people" of the Pacific coast. The road was viewed as "a national undertaking for a national purpose." It was a "military necessity." The project "was not conceived for private ends." It "originated in national necessities." "Profits to individuals" was contemplated, "but this consideration does not in itself change the relation of the parties." The "primary object of the Government was to advance its own interests." Individual co-operation was an incident—"a means to an end." That end "the securing of a road which could be used for national purposes." The Central Pacific Railroad Company was one of the "means" which Congress selected to secure the end. Congress charged it with the construction and maintenance of the road, gave it command of a national instrument, and the question now is: Does that corporation in the economy of government rank with and enjoy the immunities of the captain of a revenue cutter "on the Erie Station?"

A PAGE OF CONTEMPORANEOUS HISTORY.

Let us glance at another page of contemporaneous history—a page to which the court in *U. S.* vs. *U P. R. R. Co.* (91 U. S.) does not refer. At the time Congress passed the first Pacific Railroad Act (1862) the two political parties were contending for power in California, one of which, with a strong following, and led with consummate skill by some of its ablest public men, frankly and boldly denied the power of the Federal Government to wage against the seceding States a war to preserve the integrity of the Union. The value of the allegiance of the State to the Federal cause was inestimable. California produced nearly one-half of the gold used in the world's commerce. Her harbors were well adapted to the use of naval warfare. Had this State cast her lot with the Southern States, and given to that cause the product of her mines and the use of harbors in which to fit out vessels of war, and into which to bring their prizes, a differ-

ent result might have marked the ending of the strife. To bind this State to the Union by a transcontinental road, considering it as a war measure only, was not only a constitutional measure, but was one eminently wise and judicious. Is it conceivable that when Congress selected the Central Pacific Railroad Company as an instrument through which its purposes were to be worked out—that when it charged that company with the custody of this instrument of warfare and constituted it an agent to keep that instrument ready for use—Congress believed for a moment that the very existence of its agent was at the mercy of a State, the legislative power of which, at the next tide, might be within the control of a party whose avowed purpose was to resist the prosecution of the war in which the Government was then engaged? No historic parallel ever so clearly illustrated the wisdom of the judgments which acknowledged the right of the Federal Government to select the means by which its powers were to be executed, and placed those means beyond the reach of hostile legislation on the part of individual States.

THE LATER DECISIONS OF THE SUPREME COURT OF THE UNITED STATES.

The Union Pacific Railway Company, Eastern Division, is the corporation mentioned in section 9 of the railroad act of 1862, as the "Leavenworth, Pawnee, and Western Railroad Company of Kansas." It was chartered by the Legislature of the Territory of Kansas, and subsequently by the State of Kansas. The Pacific railroad act of 1862 constituted it one of the companies which, in connection with the Union Pacific and Central Pacific, was to construct and maintain the transcontinetal road. To the Union Pacific railroad, chartered by Congress, it bears the same relation as the Central Pacific, with this exception, that the provision in the act of 1864, section 16, which provides that the Central Pacific Railroad Company shall "enjoy all the rights, privileges and benefits conferred by this act upon the said Union Pacific Railroad Company," had no application to the Kansas company. After the road was completed through the State of Kansas the Legislature passed a law laying certain taxes upon the tangible property of the company within the jurisdiction of the State. The payment of these taxes was resisted by the company upon the ground that it was an

agent of the General Government, and that a tax upon its property would retard, impede, burden and control the company in the discharge of its duties and obligations to the Federal Government. The issue thus made came before the Supreme Court of the United States for determination in *Thompson* vs. *The Pacific R. R.* (9 Wallace, 579). The question for determination, as stated by the Court, was: "Can the right of this road to exemption from such taxation (*i. e.*, upon its tangible property) be maintained in the absence of any legislation by Congress to that effect?" (P. 589). The Court, after reviewing the various cases bearing upon the question, say: "We fully recognize the soundness of the doctrine that no State has a right to tax the means employed by the Government of the Union for the execution of its powers, but we think there is a clear distinction between a means employed by the Government and the property of agents employed by the Government. TAXATION OF THE AGENCY IS TAXATION OF THE MEANS; taxation of the property of the agent is not always nor generally taxation of the means." (P. 691). And in the case then in judgment the Court determined that the tax levied by the State of Kansas being upon the property, and not upon the agency itself, was not within the immunity, and the act of the Legislature of the State of Kansas was constitutional, and could be inforced. Some expressions in the opinion delivered by the Chief Justice in the case just cited led to the belief that the Court might maintain that there was a distinction between the property of the agent if that agent was a State corporation, and the property of the agent when that agent was a Federal corporation.

But in the case of *The Railroad Co.* vs. *Peniston*, 18 Wallace, p. 5, it was held that no such distinction existed, and that the question was not whether it was a Federal or State corporation, but that the immunity rested upon the fact that the person or corporation claiming it had been selected by the General Government as an agent in the execution of its powers. In that case the tax involved was one laid by the State of Nebraska upon the tangible property of the Union Pacific R. R. Co., a corporation created by Congress. The Court in its opinion refers to the case of *Thompson* vs. *U. P. R. R. Co.*, 9 Wallace, and says: "It is true that in the opinion delivered by the Chief Justice reference was made to the fact that the defendants were a State corporation, and an argument was attempted to be drawn from this to distinguish the

case from *McCulloch* vs. *The State of Maryland.*" (P. 36). "But," says the Court, "when the case is, as in the present case, whether the taxation of property is a taxation of means, instruments, or agencies by which the United States carries out its powers, it is impossible to see how it can be pertinent to inquire whence the property originated, or from whom its present owners obtained it. The United States have no more ownersnip of the road authorized by Congress than they have in the road authorized by Kansas. If the taxation of either is unlawful it is because the State cannot obstruct the exercise of national powers." (P. 34). "There is no difference which can be pointed out between the nature, extent, or purposes of their agency and those of the corporation complainants in this particular case." (P. 33).

"As was said in *Weston* vs. *Charleston*, they (the States) cannot, by taxation or otherwise, retard, impede, burden, or in any manner control the operation of the Constitutional laws enacted by Congress to carry into execution the powers vested in the General Government. The implied inhibition, if any exists, is against such obstruction, and that must be the same, whether the corporation whose property is taxed was created by Congress or by a State Legislature."

Reference is then made by the Court to the fact that in *McCulloch* vs. *Maryland* the tax was upon the operation of the agent; that in the case of *Osborn* vs. *The Bank* the tax was upon its right to transact business, and that a clear distinction was taken between the right of a State to tax the operation or existence of the agent, and a right to tax its tangible property within the jurisdiction of the State, and this distinction, says the Court, "so clearly drawn in the earlier decisions between a tax on the property of a governmental agent and a tax upon the operation of such agent, or upon his right to be, has ever since been recognized." (P. 36.)

And again: "It is therefore manifest that exemption of Federal agencies from State taxation is dependent not upon the nature of the agents, or upon the mode of their constitution, or upon the fact that they are agents, but upon the effect of the tax—that is, upon the question whether the tax does in truth deprive them of power to serve the Government as they were intended to serve it, or does hinder the efficient exercise of their power. A tax upon their property has no such necessary effect; it leaves them free to discharge

the duties which they have undertaken to perform. A tax upon their operations is a direct obstruction to the exercise of the Federal powers." (P. 37.) And further: "In this case the tax is laid upon the property of the railroad company precisely as was the tax complained of in *Thompson* vs. *The U. P. R. R. Co.* It is not imposed upon the franchises or the right of the company to exist and perform the functions for which it was brought into being." (P. 37).

The cases last cited are in harmony with the earlier decisions and also with the principle laid down in the case of the *Collector* vs. *Day*, 11 Wallace, 127, in which it is said: "The exemption rests upon necessary implication, and is upheld by the great law of self-preservation, as any government whose means employed in conducting its operations, if subject to the control of another and distinct government, can exist only at the mercy of that government. Of what avail are these means if another power can tax them at discretion?" The various adjudications in the National Bank cases, or the reasoning upon which they rest, do not impair the scope or vigor of the principles and authorities cited in their efficient protection from State taxation, of the means and agencies of the General Government used in execution of its constitutional powers. The National Bank cases hold that it is competent for Congress, in its establishment and arrangements of these means and agencies, to concede to the State such measures and modes of taxation as Congress deems consistent with the safety and efficiency of these means and agencies to execute the powers of the General Government; that is, taxation not by predominance of State authority, but by virtue of Federal submission of the subject to State taxation upon motives of Federal policy. But this concession is not a judicial question. The judicial conclusion excludes the taxation of the States from the province of Federal means and agencies, and requires the express assent of Federal authority to support State taxation and fix its measures and its modes. (*Osborn* vs. *The Bank of U. S., supra.*)

In no subsequent case has the force of their reasoning or the weight of the authority of the cases of *McCulloch* vs. *Maryland* and *Osborn* vs. *The Bank of the United States* been in the least abated, but, on the contrary, the principles established in those cases stand unbroken and impregnable.

In *The Railroad Co.* vs. *Peniston* (18 Wallace, 5) the Su-

preme Court, by the clearest implication, maintain that if the tax complained of in *Thompson* vs. *U. P. R. R. Co.* or the *Railroad* vs. *Peniston* had been imposed upon the franchise—the right of the company to exist—it would have been not a tax within the province of the State government to impose, but one prohibited by the Constitution of the United States. While upon this question the court is unanimous, a majority determined that the tangible property of the companies, parties to those suits, was not within the immunity claimed, but the Court divided nearly evenly, the minority holding that the exemption extended not only to the existence and being of the agent, but to all of its property within the States.

Congress by act of July 1, 1862, and an amendatory act of 1864, devolved upon the Central Pacific R. R. Co., individually and personally, the power and duty of constructing, maintaining, and operating the western division of the trans-continental railroad. That company cannot divest itself of these powers and duties without the express consent of Congress. 1 McCrary's C. C. Repts., 192; *Wood.* vs. *Truckee Turnpike Co.*, 24 Cal., 486; *Thomas* vs. *Armstrong*, 7 Cal., 286; *Monroe* vs. *Thomas*, 5 Cal., 470.

The same acts made it the duty of these companies to operate the trans-continental road as one continuous line. That duty can be, and in the case of the U. P. R. R. Co., Eastern Division, has been enforced by mandate. The privileges and duties of these corporations, derived from and due to the Federal Government, are, as we have seen, personal in their nature. They cannot voluntarily divest themselves of either, nor can the right to perform the same be transferred without the consent of Congress either voluntarily or by forced sale. How, then, can it be said that a State tax upon the right of either company to exist could be enforced without hindering, delaying, or impeding the operations of the acts of Congress in question?

Department No. 1 of the supreme court of California (*C. P. R. R. Co.* vs. *S. B., of Eq.*, 1882) maintains that the right of the corporation to exist is derived from the State of California. Conceding that to be true, nevertheless Congress, under the power to make war, has the right to seize upon this State corporation, and to convert it into an instrumentality or means to that end, and that having done so,

the existence of a power in the State to destroy that instrument cannot be admitted.

Let us take an illustration, not stronger, perhaps, than the case itself: Suppose that the Federal Government should acquire from the government of Nicaragua the right to construct an interoceanic canal across its territory, and that Congress in its wisdom should declare the Central Pacific Railroad Company an agent of the Federal Government to construct that work, and should authorize the company to maintain the same and hold it upon demand, subject to the exclusive use of the United States for military purposes, would it be contended that the State of California could destroy the Central Pacific Railroad Company, and thus nullify the action of the Federal Government?

If the State should attempt the destruction of the company, and it should interpose in its defense the act of Congress, the question would not and could not be whether the company was a Federal or a State corporation, but would be whether or not the Federal Government had selected it as a means or instrument to carry into execution the powers granted to that government, and this question determined in the affirmative would place the company beyond the reach of the attacks made by the State, either upon its existence or upon its operations.

In the opinion of the supreme court of California some force is given to the fact that Congress has passed no act exempting the property of the Central Pacific Railroad Company from taxation. In *Osborn* vs. *United States Bank*, 7 Wheat., 365, it was contended that Congress must declare the exemption from State taxation, and that it was not to be implied by the court, but the court held to the contrary. Indeed, Congress has no substantive power to exempt property from State taxation, and any provision to that effect in an act of Congress would be inoperative.

THE PRESENCE OR ABSENCE OF AN EXEMPTION CLAUSE IN THE ACT OF CONGRESS DOES NOT, AND CANNOT, AFFECT THE EXTENT OR OPERATION OF THE ACT OF CONGRESS. Congress has no power of revoking State laws as a distinct power. It legislates over subjects; and over those subjects which are within its power its legislation is supreme, and necessarily overrules all inconsistent or repugnant State legislation. If a law of the State imposing a tax upon the franchise is opposed to or inconsistent with any constitutional power which

Congress has exercised, then, so far as the incompatibility exists, the law is nugatory and void, necessarily, and by reason of the supremacy of the law of Congress. The Constitution gives to them supremacy when State laws come into opposition to them, so that the only question is, whether there be, or be not, a repugnancy or hostility between the law of Congress and the law of the State. If it should be admitted that Congress, by express terms, could have exempted this franchise from State taxation, the whole argument is effectually given up, because such terms would add nothing to the effect and operation of an act of Congress. If the tax be not inconsistent with—if it does not impede or affect the exercise of the powers of Congress, Congress would have no authority to exempt the franchise from its operation. If the tax is inconsistent with, or impedes or affects the exercise of the power, it is, as we have seen, for that reason alone, necessarily void.

A State law is powerless to take away, restrain, or abridge that which the Federal authority has lawfully given, and it is immaterial whether the privilege or immunity exists as an implication under some provision of the Constitution or laws, or is expressly declared and established. (Pomeroy's Const. Law, p. 248.)

THE DEFENDANT DERIVES MOST OF ITS FRANCHISES FROM THE GENERAL GOVERNMENT, AND IS TO ALL INTENTS AND PURPOSES A FEDERAL CORPORATION.

We have in this argument treated the Central Pacific Railroad Company as a corporation, deriving its powers from the State alone. This is not true in point of fact; so far as it was organized under State laws it was with a capital of $8,500,000, and to build a road from Sacramento City to the eastern boundary of California, a distance of one hundred and fifteen miles. Under the operation of its California charter it could only borrow money to an amount not exceeding its capital stock, and must provide a sinking fund for the ultimate redemption of its bonds. The State granted no power to build any road except from Sacramento to the State line. By the Railroad Act of 1862 Congress granted it the right to build a road and telegraph line from San Francisco to the eastern boundary line of the State, and thence through the territories of the United States until it met the road and telegraph line of the Union Pacific Com-

pany, and gave to it other privileges and immunities of a corporate character, which have been heretofore enumerated. In the Sinking Fund cases (99 U. S., 727, 728, 729) the Supreme Court of the United States, referring to the Central Pacific Railroad Company, expressly determine that these things were "additions" to the corporate power of the company, and say that "but for the CORPORATE POWERS and financial aid GRANTED BY CONGRESS, it is not probable the road would have been built." It was in this grant of corporate powers, franchises and immunities by Congress that the Court rested the authority of Congress to enact the "Thurman bill" into a law. If this Court should hold that the immunity from taxation is in any degree dependent upon the source from which the corporate powers emanated, we have in the "Sinking Fund cases" the authoritative announcement of the Supreme Court of the United States that the franchise of the Central Pacific Railroad Company in part finds its source in congressional enactment, and that to the extent of the powers so conferred the franchise is a Federal franchise. This alone would render any scheme of State taxation of the franchise impracticable. How is that part of the franchise granted by the State to be segregated from that part granted by the General Government? Which part of the life of this being is at the mercy of the State? Upon which member of its body may the State tax collector execute his judgment of death? These would be pertinent questions if an attempt had been made to assess and tax *part* of the franchise of the company. But no such attempt has been made. The paltry considerations of "mine and thine" have not agitated the State Board of Equalization, but with characteristic audacity it has seized upon the whole.

The necessities of our case fall far short of requiring us to establish the national character of the Pacific Railroad Companies. With that character established, there could be no doubt that their franchises are exempt from State taxation, and that such is their character would seem to be no longer an open question in this court.

In discussing this question, in relation to the companies mentioned in the acts of Congress chartering the Union Pacific, and which were to build the roads connecting with the eastern end of the Union Pacific (as the Central Pacific was to build the roads connecting with the western end), the Supreme Court of the United States, in the cases of the

Union Pacific Company and other companies, plaintiffs in error (115 U. S., 2), said:

"Besides the legislation of Congress in reference to all the companies so consolidated, in the acts of 1862 and 1864, and subsequent acts, all of which is reviewed and commented on in the opinion of this Court in *Ames* vs. *Kansas* (111 U. S., 449), shows that all the said companies, before the said consolidation, had received large donations of land, subsidies, powers, and privileges from Congress, and had accepted and were subject to important duties to the United States Government, and were subject to a wide control of said Government, both in the construction and management of their roads and works; and one of said companies, to wit, the Union Pacific Railroad Company, was originally incorporated and organized under said acts, and was strictly a corporation of the United States, subject to the acts of Congress, and having important duties to perform to the Government in the prosecution of its business. The facts that the last-named company is one of the constituent elements of the consolidated company, and that the entire system of roads now in its possession, and under its charge and control, constitutes one of the most comprehensive and important mediums of interstate commerce in the country, and that in all its transactions it is subject to the supervision and control of the Government of the United States, are sufficient, it seems to us, to bring the Kansas cases, as well as the other cases, fairly within the principle of the case of *Osborn* vs. *The Bank*."

And the Court further say, in the same opinion: "The whole being, capacities, authority, and obligations of the company thus consolidated are so based upon, permeated by, and enveloped in the acts of Congress referred to that it is impracticable, so far as the operations and transactions of the company are concerned, to disentangle those qualities and capacities which have their source and foundations in these acts from those which are derived from State or territorial authority." The same considerations are entirely applicable to the Central Pacific Railroad Company. In the case above referred to the point was distinctly made that defendant in error, the Kansas Company, must be regarded as having the same status as if it were still the Kansas Pacific Railroad Company, a corporation of the State of Kansas.

The Court, after remarking that this point had already received consideration, say: "But it may be added, as bearing on this particular case, that the original Kansas Company was authorized by the 9th section of the Pacific Railroad Act of July 1, 1862, to extend its road into the State of Missouri; that is, 'to construct a railroad and telegraph line *from* the Missouri river, at the mouth of the Kansas river, on the south side thereof (which is in the State of Missouri), so as to connect with the Pacific railroad of Missouri, *to* the aforesaid point on the one hundredth meridian of longitude,' namely, the point where the Union Pacific was to commence. This provision looked to the establishment of a continuous line of railroad from the Mississippi river, at St. Louis (the eastern terminus of the Pacific railroad of Missouri), to the Pacific Ocean. The power assumed by Congress in giving this authority to the Kansas Company was, undoubtedly, assumed to be within the power 'to regulate commerce among the several States;' and, although by an act of the Legislature of Missouri, passed in February, 1865, the consent of that State was also given to the extension of the road into its territory and to its connection with the Missouri road, the fact remains that the company claimed and assumed to exercise its powers under the act of Congress, as well as by the consent of the Legislature of Missouri."

The attempt of the State of California to levy a tax upon the existence of an agent of the National Government is a clear case of usurpation, an open defiance of the supremacy of the Federal Government as maintained in every adjudication made by the Supreme Court of the United States upon the subject.

118-417

Sipulation between E. C. Marshall and P. D. Wigginton, filed in Circuit Court for the District of California, December 8th, 1885.

SUPREME COURT OF THE UNITED STATES.

No. 619.

THE COUNTY OF SAN BERNARDINO, PLAINTIFF IN ERROR,

vs.

THE SOUTHERN PACIFIC RAILROAD COMPANY.

FILED 1885.

In the Circuit Court of the United States, Ninth Circuit, District of California.

THE COUNTY OF SAN BERNARDINO, Plaintiff,
vs.
THE SOUTHERN PACIFIC RAILROAD COMPANY, Defendant. } No. 2757.

It is hereby stipulated, between the parties to the above-entitled action, that for the fiscal year 1880–'81 the principal of the tax claimed to be due by plaintiff from defendant for State and county purposes amounted to $13,394.88; that before judgment was entered herein in this court—from which judgment a writ of error has been taken—there had been paid on account of such taxes to the plaintiff herein, through its county officers, the sum of $4,932.40, leaving a balance due of $8,462.48, for which said sum judgment was taken.

That for the fiscal year 1881–'82, the principal of the tax claimed to be due by plaintiff, The County of San Bernardino from defendant for State and county purposes was $16,347.87; that before judgment was entered in the action brought to recover such taxes, the defendant therein, The Southern Pacific Railroad Company, paid to the plaintiff, through its county officers on account of such taxes, the sum of $6,518.20, and judgment was taken in said action for the balance, $9,829.67.

That for the fiscal year 1882 the total amount claimed by said county from defendant, The Southern Pacific Railroad Company, for State and county purposes was $9,631.45 that no payment had been made on account of said taxes and judgment was, therefore, taken for the full amount.

That in the three actions brought to recover taxes claimed to be due to the county of San Bernardino from the defendant herein the total amount claimed as principal of State and county taxes, when the aforesaid judgments were entered, was $27,923.60, which amount was, upon the rendition of said judgments, paid in full to the Attorney General, attorney for plaintiff, and by him subsequently paid into the county treasury of San Bernardino county as directed by law for the use and benefit of the State and of the county, and that said payment, together with the sums which had prior thereto been paid by said defendant, The Southern Pacific Railroad Company, on account of said taxes constituted payment in full of the principal of all State and county taxes claimed to be due for the three years aforesaid.

(Signed) E. C. MARSHALL,
Att'y Gen'l Cal. and Att'y for Pl'ff.
P. D. WIGGINTON,
Att'y for Defendant.

Endorsed: Filed December 8th, 1885. L. S. B. Sawyer, clerk, by F. D. Moncton, deputy clerk.

I, Lorenzo S. B. Sawyer, clerk of the circuit court of the United States for the district of California, do hereby certify the foregoing to be a full, true, and correct copy of a stipulation, filed this day in the cause entitled, The County of San Bernardino *vs.* The Southern Pacific Railroad Company, No. 2757.

Attest my hand and seal of said circuit court this 8th day of December, A. D. 1885.

L. S. B. SAWYER, *Clerk.*
By F. D. MONCTON,
Deputy Clerk.